No. 12337

United States
Court of Appeals
For the Ninth Circuit.

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES, et al.,

Appellants,

vs.

THE OKONITE-CALLENDER CABLE COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the Southern District of California, Central Division

No. 8493-Y

THE OKONITE-CALLENDER CABLE COMPANY, INCORPORATED,

Plaintiff,

vs.

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES, a Municipal Corporation,

Defendants.

COMPLAINT FOR MONEY DUE ON CONTRACT

Comes now the plaintiff in the above-entitled action and for cause of action alleges:

I.

Plaintiff is a corporation incorporated under the laws of the State of New Jersey, having its principal office at Paterson, New Jersey.

II.

Defendant, The City of Los Angeles, is now, and was at all times in this Complaint mentioned, a municipal corporation duly organized, incorporated and existing under and by virtue of the laws of the State of California, having its principal office at Los Angeles, [2*] California, and said defendant is a citizen of the State of California.

* Page numbering appearing at foot of page of Certified Transcript of Record.

III.

Defendant, Department of Water and Power of the City of Los Angeles, is a department of The City of Los Angeles and is a citizen of the State of California.

IV.

The amount in controversy herein exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

V.

On or about the 21st day of May, 1946, plaintiff and defendants entered into a written contract wherein and whereby plaintiff agreed to manufacture, sell and deliver and defendants agreed to purchase certain paper insulated, lead covered cable, more particularly described as follows:

Item VI—35,000 ft. No. 2/0, 5000 volt, 3 conductor, stranded.

Item VII—48,000 ft. No. 6 AWG, 5000 volt, 3 conductor, stranded.

Item X—2,000 ft. 1,500 MCM, 600 volt, single conductor, stranded.

Item XIV—76,000 ft. 1/0, 600 volt, single conductor, stranded.

Item XV—100,000 ft. No. 4 AWG, 600 volt, single conductor, stranded.

Item XVI—80,000 ft. No. 6 AWG, 600 volt, single conductor, stranded.

VI.

That in and by said contract it was agreed that

said cable should be furnished at the following base prices:

Item VI—$912.00 per M Ft., Total.....$31,920.00
Item VII—$489.00 per M Ft., Total.....$23,472.00
Item X—$1142.00 per M ft., Total.....$ 2,284.00
Item XIV—$185.00 per M Ft., Total....$14,060.00
Item XV—$120.00 per M Ft., Total.....$12,000.00
Item XVI—$92.00 per M Ft., Total.....$ 7,360.00

VII.

That in and by said contract it was provided that the aforesaid prices for said cable should be subject to adjustment upwards or [3] downwards in the event of changes in labor costs and/or material costs, and for the purpose of such adjustment the proportion of the contract price representing labor was agreed upon by the plaintiff and said defendants as twenty (20%) per cent of said contract price, and for the purpose of adjustment of the contract price with respect to materials used in the manufacture of said cable, it was agreed between the plaintiff and the said defendants that material would represent fifty (50%) per cent of the contract price. During the term of said contract, labor costs increased and the plaintiff and the said defendants were able to agree upon the amount of the increase of the contract price with respect to said items under a formula contained in the said contract and said adjustment of the contract price because of the increase in labor costs is not here in controversy.

VIII.

Said contract provided that if the materials used in said cable increased in price as shown by the index of wholesale prices compiled monthly by the United States Department of Labor over the index price for the base month provided for in said contract, that said contract price would be increased based upon said United States Department of Labor index. Said price index in question would be applied as of the month specified in said contract for the delivery of the cable in that particular month. Said contract further provided for a decrease in the contract price if the cost of materials used in said cable decreased, based on said index of the United States Department of Labor. Plaintiff's claim herein is based on increases of the cost of materials used in said cable during the period of said contract. Said contract further provided that payment for increases or credit for decreases in the contract price resulting from the foregoing adjustments would be deferred until the time of final payment under the terms of said contract. Said contract further provided that the total contract price should not be increased under said adjustment clause by more than thirty (30) per cent of the original contract price. [4]

IX.

Plaintiff alleges that during the period of said contract and before the completion thereof, increases occurred in the cost of both labor and materials. That the two principal materials used in

the manufacture of said cable were copper and lead and that the average increase in the monthly index figures referred to in said contract and compiled by the United States Department of Labor for copper and lead for the period from April, 1946, the base month, to October, 1946, was 28.6; for the period from April, 1946, to January, 1947, was 53.9, and for the period from April, 1946, to March 1947, was 70.2; and the percentage increase for the period from April, 1946, to October, 1946, was 17.6%; for the period from April, 1946, to January, 1947, was 33.2%; for the period from April, 1946 to March, 1947, was 43.2%.

X.

That plaintiff and defendants were and are unable to agree upon the amount of the increase of the contract price because of the materials used in said cable.

XI.

That prior to the commencement of this action, plaintiff duly and regularly filed and presented to the defendants a duly verified claim as required by law, claiming that said defendants, and each of them, were and are indebted to the plaintiff in the amount herein sued for, in addition to the further amount of Three Thousand Six Hundred Seventy-one and 56/100 Dollars ($3,671.56) referred to in Paragraph XII.

XII.

That thereafter and on or about January 14, 1948, the defendants notified plaintiff that plaintiff's

claim was allowed in the sum of Three Thousand Six Hundred Seventy-one and 56/100 Dollars ($3,671.56), but the balance of the claim was rejected without prejudice either to the plaintiff or to said defendants. That [5] plaintiff has complied with all of the conditions necessary to entitle plaintiff to bring this action against the said defendants, The City of Los Angeles and the Department of Water and Power of The City of Los Angeles, and plaintiff has duly performed all the terms and conditions of said contract on its part to be performed.

XIII.

That said allowance by the said defendants of Three Thousand Six Hundred Seventy-one and 56/100 Dollars ($3,671.56) constitutes a part only of the increased contract price occasioned by the increase in the cost of copper and lead used in the manufacture of said cable as evidenced by the United States Department of Labor index.

XIV.

That pursuant to the price adjustment clause in said contract, plaintiff became entitled to an increase in the base contract price on account of materials used in said cable in the amount of Thirteen Thousand Six Hundred Sixty-eight and 46/100 Dollars ($13,668.46). That the said defendants are entitled to a credit with respect to said amount in the sum of Three Thousand Six Hundred Seventy-one and 56/100 Dollars ($3,671.56) representing a portion of plaintiff's claim allowed by said defendants

and paid by said defendants prior to the filing of this action, leaving a balance now due, owing and unpaid from said defendants to plaintiff in the sum of Nine Thousand Nine Hundred Ninety-six and 90/100 ($9,996.90). That said sum, together with the allowance of Three Thousand Six Hundred Seventy-one and 56/100 Dollars ($3,671.56), does not exceed the thirty (30%) per cent limitation hereinbefore referred to in Paragraph VIII of this Complaint.

Wherefore, plaintiff prays judgment against the defendants, and each of them, in the sum of Nine Thousand Nine Hundred Ninety-six [6] and 90/100 Dollars ($9,996.90), together with interest thereon at the rate of seven per cent (7%) per annum from the 1st day of March, 1947, until paid, for plaintiff's costs herein incurred and for such other and further relief as may be just in the premises.

/s/ STEPHEN A. WILSON,
By FREDERIC H. STURDY.
/s/ HENRY F. PRINCE,
By FREDERIC H. STURDY.
/s/ FREDERIC H. STURDY.
GIBSON, DUNN & CRUTCHER
By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 2, 1948. [7]

[Title of District Court and Cause.]

ANSWER

Come Now the defendants The City of Los Angeles, a municipal corporation, and the Department of Water and Power of the City of Los Angeles, and answering plaintiff's complaint herein, admit, allege and deny as follows:

I.

These answering defendants admit the allegations of Paragraphs I, II, III and IV of plaintiff's complaint. [8]

II.

Answering the allegations of Paragraphs V and VI of plaintiff's complaint, these answering defendants admit and allege that on May 21, 1946, the defendant Department of Water and Power of the City of Los Angeles and the plaintiff herein executed a written contract, pursuant to advertisement inviting bids and award, for the furnishing and delivering to the Department of paper insulated, lead covered cable, f.o.b. cars, Paterson, New Jersey, in the quantities, kind and at the prices as follows:

Item VI—35,000 feet No. 2/0, 5000 volt, 3 conductor, stranded, for a price of $912.00 per thousand feet, making a total price of.....	$31,920.00
Item VII—48,000 feet No. 6 AWG, 5000 volt, 3 conductor, stranded, for a price of $489.00 per thousand feet, making a total price of.....	23,472.00

Item X—2,000 feet 1,500 MCM, 600 volt, single conductor, stranded, for a price of $1142.00 per thousand feet, making a total price of..... $ 2,284.00

Item XIV—76,000 1/0, 600 volt, single conductor, stranded, for a price of $185.00 per thousand feet, making a total price of..... 14,060.00

Item XV—100,000 feet No. 4 AWG, 600 volt, single conductor, stranded, for a price of $120.00 per thousand feet, making a total price of..... 12,000.00

Item XVI—80,000 feet No. 6 AWG, 600 volt, single conductor, stranded, for a price of $92.00 per thousand feet, making a total price of..... 7,360.00

Further answering the allegations of said Paragraphs V and VI, these answering defendants admit and allege that said contract also provided that said lead covered cable would be delivered to the Department, f.o.b. cars, Paterson, New Jersey, in sufficient time so that receipt thereof at Los Angeles, California, as to each item or portion thereof, would begin and be completed as follows:

	Item No.	Beginning Date	Completion Date
VI	15 reels	July 1, 1946	October 31, 1946
	10 reels	November 1, 1946	January 31, 1947
	10 reels	February 1, 1947	March 31, 1947
VII, X, XIV, XV, XVI	1/3	July 1, 1946	October 31, 1946
	1/3	November 1, 1946	January 31, 1947
	1/3	February 1, 1947	March 31, 1947

Further answering the allegations of Paragraphs V and VI of plaintiff's complaint, these answering defendants deny generally and specifically each and every allegation contained and set forth in said Paragraphs V and VI not herein expressly admitted in this Paragraph II of defendant's answer.

III.

Answering the allegations of Paragraphs VII and VIII of plaintiff's complaint, these answering defendants admit and allege that said contract also provided as follows:

"1.3. Price Adjustment Clause: The contract price shall be subject to adjustment for changes in labor and/or material costs, such adjustments to be determined in accordance with the following method, provided, however, that the price shall not be increased by virtue of this adjustment to an amount in excess of the applicable maximum price established at the date of delivery by the OPA pursuant to the Emergency Price Control Act of 1942.

"1. Labor:

"a. For the purpose of adjustment, the proportion of the contract price representing labor is accepted as 20%.

"b. The above amount accepted as representing labor will be adjusted for increases in labor costs, such adjustment to be based on the index of hourly earnings of the 'Electrical Equipment' manufacturing industry, compiled monthly by the U. S. Department of Labor, Bureau of Labor Statistics. The average of the monthly labor index figures for

the period from the date of receipt of the Contractor's proposal, April, 1946, (hereinafter referred to as the Base Month) to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly labor index figure with the labor index figure for the Base Month. The adjustment [11] for increases in labor will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing labor, as indicated above, and the result will be accepted as an increase in the contract price.

"c. If the average monthly labor index figure computed as provided in paragraph b above is less than the labor index figure for October, 1941, the percentage decrease of such average monthly labor index figure from such October, 1941, figure will be computed. The adjustment for decrease in labor will be obtained by applying such percentage of decrease to the amount of the contract price representing labor, as indicated above, and the result will be accepted as a decrease in the contract price.

"2. Material:

"a. For the purpose of adjustment, the proportion of the contract price representing material is accepted as 50%.

"b. The above amount accepted as representing material will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for 'Group VI—Metals

and Metal Products' compiled monthly by the U. S. Department of Labor. The average of the monthly material index figures for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly material index figure with the material index figure for the Base Month. The adjustment for increases in material will be obtained by applying such percentage of increase, [12] if any, to the amount of the contract price representing material, as indicated above, and the result will be accepted as an increase in the contract price.

"c. If the average monthly material index figure computed as provided in paragraph b, is less than the material index figure for October, 1941, the percentage decrease of such average monthly material index figure from such October, 1941, figure will be computed. The adjustment for decrease in material will be obtained by applying such percentage of decrease to the amount of the contract price representing material, as indicated above, and the result will be accepted as a decrease in the contract price.

"3. General:

"a. The adjustment to which the contract price is subject will be determined as provided for above, except—

"1. If shipment under this contract is extended more than three months from the contract date as

a result of causes beyond the reasonable control of the contractor, or because of fire, strike, civil or military authority, etc., the adjustment in contract price for changes in labor and material costs may at the option of the contractor be based on the period from date of receipt of contractor's quotation to the date when complete shipment is made.

"2. If the contract is modified, resulting in a change in contract price or contract date of shipment, the adjustment will be modified accordingly.

"b. In determining the adjustment in contract price, the percentage of increase or decrease in labor and material costs will be calculated to the nearest 1/10th of 1%. [13]

"c. If for any reason the statistics compiled by the U. S. Department of Labor, and referred to above, are not available for use in connection with adjustment in the contract price, adjustment will then be made by means in similar indices. In such event, the selection of substitute indices will be made by mutual agreement of the parties to this contract.

"d. Payment for increase or credit for decrease in the contract price, resulting from the above will be deferred until the time for final payment under the terms of the contract.

"Ceiling for Expenditures: The total price shall not be increased under the foregoing price adjustment clause by more than 30 per cent over the original bid price."

Further answering the allegations of Paragraphs

VII and VIII, these answering defendants admit that during the term of said contract the labor cost increased and the plaintiff and defendants agreed upon the amount of the increase of the contract price with respect to said items under the above-quoted provisions of the contract, and that the adjustment of the contract price on account of increase in labor cost is not in controversy in this action.

Further answering the allegations of Paragraphs VII and VIII, these defendants deny generally and specifically each and every allegation therein contained and set forth not herein expressly admitted in this Paragraph III of defendant's answer. [14]

IV.

Answering the allegations of Paragraph IX of said complaint, these answering defendants admit and allege that from the month of April, 1946, to the month of March, 1947, both months inclusive, the index of wholesale prices for "Group VI—Metals and Metal Products"—compiled monthly by the United States Department of Labor showed an increase in material costs and the index of hourly earnings of the "Electrical Equipment" Manufacturing Industry compiled by the United States Department of Labor, Bureau of Labor Statistics, showed an increase in labor costs.

Further answering the allegations of said Paragraph IX, these answering defendants admit that lead and copper constitute a large proportion of the materials used in the manufacture of said cable.

Further answering the allegations of said Paragraph IX, these answering defendants admit and allege that the United States Department of Labor, Bureau of Labor Statistics, published in each month from April, 1946, to March, 1947, both months inclusive, its computation of index numbers of wholesale prices by groups and subgroups of commodities and by individual commodities, and that said groups were designated as follows:

Farm Products
Foods
Hides and Leather Products
Textile Products
Fuel and Lighting Materials
Metals and Metal Products
Building Materials
Chemical and Allied Products
Housefurnishing Goods
Miscellaneous. [15]

These defendants admit and allege that the sixth group of index numbers of wholesale prices so published—"Metals and Metal Products"—was divided into subgroups of commodities as follows:

Agricultural Implements
Iron and Steel
Motor Vehicles
Nonferrous Metals
Plumbing and Heating.

These defendants admit and allege that there are sixteen commodities listed under the subgroup

"Nonferrous Metals," including "Copper, Electrolytic," delivered Connecticut Valley, and "Lead, Pig, Desilverized," f.o.b. New York.

These defendants admit and allege that said publication of index numbers of wholesale prices was based upon the prices for the year 1926 equalling 100, and that said publication set forth an index number of the wholesale price for each group of commodities above mentioned and set forth an index number of the wholesale price of each subgroup of commodities above mentioned and an index number of the wholesale price of each individual commodity listed under each group and subgroup of commodities above mentioned.

These defendants admit and allege that for said months beginning in April, 1946, and ending in March, 1947, both months inclusive, said United States Department of Labor, Bureau of Labor Statistics, published the index numbers of the wholesale price of "Copper, Electrolytic," delivered Connecticut Valley, and "Lead, Pig, Desilverized," f.o.b. New York, as hereinafter set forth under Columns 1, 2 and 3, respectively; that the sum of said two index numbers for each of said months, respectively, [16] is the amount hereinafter set forth under Column 4; that the average amount of the two index figures for the period from the base month of April, 1946, to and including each of the several months specified in the contract for final shipments and the increase of said average amount over said base month, and the respective percent-

ages of increase of each of said average figures over said base month are hereinafter set forth under Columns 5, 6 and 7, to wit:

1. (Month)	2. (Copper)	3. (Lead)	4. (Total)	5. (Average)	6. (Increase)	7. (Increase)
Apr. 1946	85.4	77.1	162.5			
May	85.4	77.1	162.5			
June	102.3	97.9	200.2			
July	102.3	109.7	212.0			
Aug.	102.3	97.9	200.2			
Sept.	102.3	97.9	200.2			
Oct.	102.3	97.9	200.2	191.1	28.6	17.6%
Nov.	122.6	125.6	248.2			
Dec.	138.8	145.3	284.1			
Jan. 1947	139.6	154.2	293.8	216.4	53.9	33.2%
Feb.	142.3	157.2	299.5			
Mar.	151.2	177.9	329.1	232.7	70.2	43.2%

Further answering the allegations of Paragraph IX of said complaint, these answering defendants deny generally and specifically each and every allegation contained and set forth in said Paragraph IX not herein in this Paragraph IV of this answer expressly admitted. [17]

V.

Answering the allegations of Paragraph X of plaintiff's complaint these answering defendants admit and allege that plaintiff and defendants were and are unable to agree upon the amount of the increase of the contract price, in accordance with the terms of Paragraph F 1.3, Price Adjustment Clause, of the contract heretofore alleged and set forth in Paragraph III of this answer, by reason of the increases in material costs.

Further answering the allegations of Paragraph X of said complaint, these answering defendants

deny generally and specifically each and every allegation contained and set forth in said Paragraph X not herein in this Paragraph V of this answer expressly admitted.

VI.

Answering the allegations of Paragraph XI of plaintiff's complaint, these answering defendants admit and allege that on September 30, 1947, and prior to the commencement of this action, plaintiff filed and presented to the defendants a verified claim, claiming that said defendants were indebted to the plaintiff in the amount of $15,869.40, less the sum of $2,016.32 theretofore billed by the plaintiff and paid by the defendants, plus California Use Tax, on account of increases in labor and material costs, leaving a balance claimed by plaintiff in the sum of $13,853.08, plus California Use Tax thereon in the sum of $346.33, making a total claim of $14,-199.41.

Further answering the allegations of Paragraph XI of said complaint, these answering defendants deny generally and specifically each and every allegation contained and set forth in said Paragraph XI not herein in this Paragraph VI of this answer expressly admitted.

VII.

Answering the allegations of Paragraph XII of plaintiff's complaint, these answering defendants admit that [18] thereafter and on or about January 14, 1948, the defendants notified plaintiff that plaintiff's claim was allowed in the sum of $3,671.56, but the balance of said claim was re-

jected, without prejudice either to the plaintiff or to these defendants, and that plaintiff has duly performed all of the conditions of said contract on its part to be performed.

Further answering the allegations of Paragraph XII of said complaint, these answering defendants deny generally and specifically each and every allegation contained and set forth in said Paragraph XII not herein in this Paragraph VII of this answer expressly admitted.

VIII.

Answering the allegations of Paragraph XIII of plaintiff's complaint, these answering defendants admit and allege that said allowance by these defendants of the sum of $3,671.56 included $89.55 on account of California Use Tax, and constitutes a part only of the increased contract price in the total amount of $5,598.33, of which amount the sum of $2,016.32 was paid prior to the filing of said claim, occasioned by increases in labor costs, in accordance with the terms of the contract, as well as by increases in material costs based on the index of wholesale prices for "Group VI—Metals and Metal Products"—compiled monthly by the United States Department of Labor, and computed in accordance with the terms of said contract hereinabove set forth in Paragraph III of this answer.

Further answering the allegations of Paragraph XIII of said complaint, these answering defendants deny generally and specifically each and every allegation contained and set forth in said Para-

graph XIII not herein in this Paragraph VIII of this answer expressly admitted. [19]

IX.

Answering the allegations of Paragraph XIV of plaintiff's complaint, these answering defendants admit and allege that pursuant to the Price Adjustment Clause in said contract hereinbefore alleged in Paragraph III of this answer, plaintiff became entitled to an increase in the contract price on account of labor costs computed in accordance with the terms of said contract and on account of increases in material costs, based on the index of wholesale prices for "Group VI—Metal and Metal Products" compiled monthly by the United States Department of Labor, in the amount of $5,598.33, plus California Use Tax thereon, and no more.

These defendants admits and allege that prior to the filing of said claim and between the months of April, 1946, and January, 1947, both months inclusive, the plaintiff shipped to the defendants lead covered cable the contract price of which, as hereinbefore alleged, was $61,053.35, plus California Use Tax in the amount of $1,418.95; that plaintiff computed the amount of the increase thereon on account of increases in labor costs as being the sum of $733.31, and computed the amount of increase thereon on account of increases in material costs to be the sum of $1,283.01, making a total of $2,016.32, plus California Use Tax in the amount of $50.40, and that plaintiff billed these defendants

therefor and that these defendants paid said sum, plus California Use taxes thereon, to plaintiff on account of said increases in labor costs and in material costs.

These defendants admit and allege that subsequent to the filing of said claim, as alleged in plaintiff's complaint, these answering defendants paid to plaintiff the additional sum of $3,671.56, of which the sum of $659.54 was on account of increases in labor costs and the sum of $2,922.47 was on account of increases in material costs, and the sum of $89.55 was on account of California Use Tax thereon.

These defendants admit and allege that the total amount paid to plaintiff on account of increases in labor costs and material costs is the sum of $5,598.33, plus California Use Tax thereon, and that said sum is comprised of $1,392.85 on account of increases in labor costs and $4,205.48 on account of increases in material costs; that said defendants are entitled to a credit with respect to said amount of $5,598.33, plus all taxes, representing the amount paid prior to the filing of plaintiff's claim and the amount paid subsequent to the filing of said claim and prior to the filing of this action; that the total price is not increased by more than thirty per cent over the original contract price hereinbefore in this answer alleged.

Further answering the allegations of Paragraph XIV of plaintiff's complaint, these answering defendants allege that for the months beginning April, 1946, and ending in March, 1947, said United States Department of Labor, Bureau of Labor Statistics,

published the index of wholesale prices for "Group VI—Metal and Metal Products," as hereinafter set forth under Columns 1 and 2, and that the average amount of said index figures for the period from the base month of April, 1946, to and including each of the several months specified in the contract for final shipments, and the increase of said average amount over said base month, and the respective percentages of increase of each of said average figures over said base month, are as hereinafter set forth under Columns 3, 4 and 5, to wit: [21]

1. Month)	2. (Group VI)	3. (Average)	4. (Increase)	5. (Increase)
Apr. 1946	108.8			
May	109.4			
June	112.2			
July	113.3			
Aug.	114.0			
Sept.	114.2			
Oct.	125.8	114.0	5.2	4.8%
Nov.	130.2			
Dec.	134.7			
Jan. 1947	138.0	120.1	11.3	10.4%
Feb.	137.9			
Mar.	139.9	123.2	14.4	13.2%

These defendants admit and allege that based upon the increase of said average amount over said base month and the respective percentages of increase hereinbefore in this paragraph alleged, according to the index of wholesale prices for "Group VI—Metal and Metal Products," the total amount of the increases in material costs under said contract is the sum of $4,205.48.

That said sum is computed in accordance with the provisions of said contract in the manner here-

inafter set forth, namely, that the contract item number, the month specified in the contract for final shipment, the amount of the particular item to be delivered, the original contract price, the per cent of contract price applicable to materials, the per cent of increase for each period and the amount of increase in dollars [22] and cents, are all as hereinafter set forth under Columns 1 to 7, respectively, and the product of the figures in Columns 3, 4, 5 and 6 being set forth in Column 7, which is the amount of the increase expressed in dollars and cents, to wit:

1.	2.	3.	4.	5.	6.	7.
	Oct. 1946	3/7 ×	$31,920.00 ×	50% ×	4.8% =	$ 328.32
VI	Jan. 1947	2/7 ×	31,920.00 ×	50% ×	10.4% =	474.24
	Mar. 1947	2/7 ×	31,920.00 ×	50% ×	13.2% =	601.92
VII, X,	Oct. 1946	1/3 ×	59,176.00 ×	50% ×	4.8% =	473.41
XIV, XV,	Jan. 1947	1/3 ×	59,176.00 ×	50% ×	10.4% =	1,025.72
XVI	Mar. 1947	1/3 ×	59,176.00 ×	50% ×	13.2% =	1,301.87
					Total Material Increase	$4,205.48

These defendants allege that the original contract price of $91,096.00 for all of the material agreed to be furnished, and furnished, by plaintiff herein has been paid, and that all of the money due under the terms of said contract on account of increases in labor costs and on account of increases in material costs, as hereinbefore alleged, have been heretofore paid by these defendants to plaintiff herein, and that no additional money is now unpaid by these defendants to plaintiff herein under and by virtue of the terms and provisions of the above-mentioned contract. [23]

Wherefore, these answering defendants pray that plaintiff take nothing by reason of their complaint herein; for their costs of suit herein incurred; and for such other and further relief as may be just in the premises.

/s/ RAY L. CHESEBRO,
City Attorney,
/s/ GILMORE TILLMAN,
Chief Assistant City Attorney for Water and Power,
/s/ RUSSELL B. JARVIS,
Assistant City Attorney,
/s/ GERALD LUHMAN,
Deputy City Attorney,
Attorneys for Defendants.

State of California,
County of Los Angeles—ss.

William A. Holt, being first duly sworn, deposes and says:

That the Department of Water and Power of The City of Los Angeles, one of the defendants in the above-entitled action, is a department of the City government created by the Charter of The City of Los Angeles, a municipal corporation of the State of California, and is under the control and management of the Board of Water and Power Commissioners of The City of Los Angeles; that affiant is a member and an officer, to wit the President, of said Board; that affiant has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except

as to the matters which are therein stated upon his information or belief, and as to those matters that he believes to be true.

/s/ WILLIAM A. HOLT.

Subscribed and sworn to before me this 12th day of October, 1948.

/s/ C. L. CURLEY,
Notary Public in and for Said County and State.

[Notarial Seal.]

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 14, 1948.

[Title of District Court and Cause.]

PLAINTIFF'S PRE-TRIAL POINTS AND AUTHORITIES PURSUANT TO LOCAL RULE 12

I.

Statement of Issues Raised by the Pleadings

The plaintiff, The Okonite-Callender Cable Company, Incorporated, a New Jersey corporation, hereinafter referred to as Okonite, brought this action against the Department of Water and Power to The City of Los Angeles and The City of Los Angeles to recover the sum of $9,996.90, together with interest thereon, claiming that said amount is owing to the plaintiff from the defendants under and by virtue of a price adjustment or escalator clause

contained in a contract entered into between the plaintiff, Okonite, and the defendants pursuant to a [27] call for competitive bids for the manufacture of certain lead covered cable containing copper conductors complying with the specifications and requirements of the Department of Water and Power of The City of Los Angeles and The City of Los Angeles in their request for bids.

The only issue between the plaintiff and the defendants is as to the correct interpretation of the price adjustment clause as applied to certain monthly statistical information published by the United States Department of Labor. There is no controversy as to the publications themselves. The issue is a narrow one and resolves itself into which set of data contained in the Bureau of Labor publications is to be used in computing the increased price of materials under the price adjustment clause of the contract.

The defendants agree with the plaintiff that if plaintiff's construction of the escalator clause as applied to the Bureau of Labor Statistics is correct, that plaintiff is entitled to recover the sum of $9,996.69 with interest. (Only 21c less than plaintiff claims in its Complaint, which slight amount plaintiff is, of course, willing to waive.) Plaintiff and defendants are likewise in agreement that if defendants' construction of the price adjustment clause as applied to the monthly Bureau of Labor data is correct, that plaintiff is not entitled to recover in any amount whatsoever.

Defendants' Answer admits that the plaintiff is a New Jersey corporation; that The City of Los Angeles and the Department of Water and Power of The City of Los Angeles are citizens of the State of California, and that the amount in controversy, exclusive of interest and costs, exceed $3,000.

A comparison of the Complaint with defendants' Answer shows that there is no controversy other than as we have hereinbefore indicated. The Complaint alleged that the prices for said cable should be subject to adjustment upwards or downwards in the event of changes in labor costs and/or material costs as provided for in the price adjustment clause, and the Answer does not controvert these general allegations. Plaintiff pleaded the substance of the contract and the defendants have set out verbatim the portion of the contract containing the price adjustment clause. The Answer of defendants has gone further and has set up specific data from the U. S. Department of Labor publications, one of which will apply if plaintiff's contentions are correct and the other if defendants' contentions are correct. Paragraph IX of the Complaint alleges that during the period of said contract increases occurred in the cost of both labor and materials. That the two principal materials used in the manufacture of said cable were copper and lead. The percentage increases in said costs are then set out. Paragraph IV on Page 8 of defendants' Answer admits that the wholesale prices for "Group VI—Metals and Metal Products" compiled monthly by the United States Department of

Labor showed an increase in material costs. Defendants admit "that lead and copper constitute a large proportion of the materials used in the manufacture of said cable," and thereafter in Paragraph IV defendants set out tabulations taken from the United States Bureau of Labor Statistics relating to copper and lead for the months involved in this contract and the percentage increase with respect to material is exactly in accordance with the percentage increases set out in Paragraph IX of plaintiff's Complaint.

Paragraph X of plaintiff's Complaint alleged:

> "That plaintiff and defendants were and are unable to agree upon the amount of the increase of the contract price because of the materials used in said cable."

Paragraph V of defendants' Answer reads as follows:

> "Answering the allegations of Paragraph X of plaintiff's complaint these answering defendants admit and allege that plaintiff and defendants were and are unable to agree upon the amount of the increase of the [29] contract price, in accordance with the terms of Paragraph F 1.3, Price Adjustment Clause, of the contract heretofore alleged and set forth in Paragraph III of this answer, by reason of the increases in material costs.
>
> Further answering the allegations of Paragraph X of said complaint, these answering defendants deny generally and specifically each

and every allegation contained and set forth in said Paragraph X not herein in this Paragraph V of this answer expressly admitted."

Paragraph XI of the Complaint alleged that plaintiff duly and regularly filed a verified claim against the defendants for the amount sought to be recovered in this action. It was further alleged that the claim was allowed in part and the balance rejected without prejudice to the plaintiff or to the defendants, and that plaintiff has fully complied with all of the conditions of the contract. These general matters are admitted by the Answer. The Answer of the defendants correctly alleged that certain amounts were paid to the plaintiff under the defendants' construction of the price adjustment clause. Some of these payments were made prior to the time when the plaintiff filed its claim against the Department of Water and Power of The City of Los Angeles and a part was paid upon a partial allowance of plaintiff's claim. The details of these partial payments and credits which the defendants are entitled to are correctly set out in defendants' Answer.

Defendants' Answer sets out the base contract price of the bid items embodied in the cable contract between plaintiff and the defendants and the delivery dates provided for in the contract.

The dollar figures referred to in Paragraphs VI, VII, VIII, IX and X of defendants' Answer are accurate as figures and are not here in controversy. They show the amounts heretofore paid either upon

invoices sent by the plaintiff or upon the claim filed by the plaintiff prior to the commencement of this action. As stated in the Complaint [30] there has been no controversy with respect to the computation in amounts under the price adjustment clause by reason of the increase in labor costs. Briefly summarized it therefore appears that defendants contend that plaintiff has been fully paid under the price adjustment clause, and plaintiff contends that under the price adjustment clause there is still due and owing to plaintiff the sum of $9,996.69, by reason of increases in material costs.

II.

Provisions of the Contract Between the Plaintiff and the Defendants.

The Contract numbered 9317 is embodied in a printed and mimeographed document, a copy of which is filed herewith, prepared and issued by the Department of Water and Power of The City of Los Angeles. The subject matter of the contract is lead covered copper power cable. Bids were called for by the defendants to cover some 16 items of this type of cable. The plaintiff, The Okonite-Callender Cable Company, Incorporated, was the successful bidder on 6 of these items. After the bid was accepted by the defendants, the plaintiff Company furnished the necessary bond, affidavits, etc., and under date of May 21, 1946, signed the contract covering the items in question. The short printed form of contract, being the first document in the contract, was signed by R. A. Heffner, President, and Joseph L. Williams, Secretary of the

Board of Water and Power Commissioners of The City of Los Angeles, and by F. Cazenove Jones, President and Stephen A. Wilson, Secretary of The Okonite-Callender Cable Co., Inc.

There is no controversy between the plaintiff and the defendants as to any of the provisions of the contract, with the exception of the controversy with respect to the interpretation of the price adjustment or escalator clause. The specifications refer to the various kinds of lead covered cable, the conductors of which [31] shall be soft drawn copper of the kind and character specified on Sheet No. 1, being the first sheet following Page 12 of the contract. Detailed specifications are given in Sheets numbered 1, 2, 3, 4 and 5 following Page 12 of the contract. The shipments of the cable were made and accepted by the defendants. We are advised that the cost of the copper contained in the inside electrical conductors and the cost of the lead contained in the lead sheath, independent of labor thereon, constitute approximately 90% of the cost of all materials used in the manufacture of the cable.

The price adjustment clause or so-called escalator clause commences on Page 10 of the contract. It is numbered 1.3 and we quote the opening paragraph headed "Price Adjustment Clause," which will also be found on Page 4 in Paragraph III of defendants' Answer.

> "1.3 Price Adjustment Clause: The contract price shall be subject to adjustment for changes in labor and/or material costs, such adjust-

ments to be determined in accordance with the following method, provided, however, that the price shall not be increased by virtue of this adjustment to an amount in excess of the applicable maximum price established at the date of delivery by the OPA pursuant to the Emergency Price Control Act of 1942."

The important provisions relating to price adjustments of the contract because of materials are set forth on Pages 11 and 12 of the contract. These are likewise set out verbatim at the middle of Page 5 and continuing on Pages 6 and 7 of defendants' Answer. For the convenience of the Court we quote the provisions of the price adjustment clause dealing with materials:

"2. Material:

a. For the purpose of adjustment, the proportion [32] of the contract price representing material is accepted as 50%.

b. The above amount accepted as representing material will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for 'Group VI—Metals and Metal Products' compiled monthly by the U. S. Department of Labor. The average of the monthly material index figures for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly material

index figure with the material index figure for the Base Month. The adjustment for increases in material will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing material, as indicated above, and the result will be accepted as an increase in the contract price.

c. If the average monthly material index figure computed as provided in paragraph b, is less than the material index figure for October, 1941, the percentage decrease of such average monthly material index figure from such October, 1941 figure will be computed. The adjustment for decrease in material will be obtained by applying such percentage of decrease to the amount of the contract price representing material, as indicated above, and the result will be accepted as a decrease in the contract price.

"3. General:

a. The adjustment to which the contract price is subject will be determined as provided for above, except——

1. If shipment under this contract is extended more [33] than three months from the contract date as a result of causes beyond the reasonable control of the contractor, or because of fire, strike, civil or military authority, etc., the adjustment in contract price for changes in labor and material costs may at the option of the contractor be based on the period from

date of receipt of contractor's quotation to the date when complete shipment is made.

2. If the contract is modified, resulting in a change in contract price or contract date of shipment, the adjustment will be modified accordingly.

b. In determining the adjustment in contract price, the percentage of increase or decrease in labor and material costs will be calculated to the nearest 1/10th of 1%.

c. If for any reason the statistics compiled by the U. S. Department of Labor, and referred to above, are not available for use in connection with adjustment in the contract price, adjustment will then be made by means in similar indices. In such events, the selection of substitute indices will be made by mutual agreement of the parties to this contract.

d. Payment for increase or credit for decrease in the contract price, resulting from the above will be deferred until the time for final payment under the terms of the contract.

"Ceiling for Expenditures: The total price shall not be increased under the foregoing price adjustment clause by more than 30 per cent over the original bid price."

One other provision contained elsewhere in the contract may be mentioned, namely, that payments became due under the contract 30 days from the date of invoices subject to a discount of ½ of 1% for payment in 10 days from the date of invoice.

Plaintiff's argument with respect to the proper interpretation of the contract in the light of the subject matter of the contract and in the light of the Bureau of Labor Statistics will be covered in a subsequent portion of these Points and Authorities under the hearing of Argument.

III.

Bureau of Labor Statistics

The price adjustment or escalator clause in the contract, for the purpose of determining the increase or decrease of cost of materials used in the cable, refer to the source data "compiled monthly by the U. S. Department of Labor." Both the plaintiff and the defendants are in agreement that this source data is contained in Department of Labor monthly publications for each month beginning with April, 1946 and ending with March, 1947. These mimeographed reports by the U. S. Department of Labor are issued about the end of each calendar month. Considerably after the end of the year the Department then issues a permanent printed bulletin which combines the data contained in the monthly bulletins. For example, the Bulletin numbered 920 entitled "Wholesale Prices, 1946" which will be before the Court was not published until May of 1948 and this is considered by the Department the final data with respect to individual commodity wholesale prices, index numbers and index numbers of groups and subgroups of commodities for the year 1946. As stated, however, the contract refers to the monthly bulletins.

These monthly bulletins contain the data which plaintiff contends should be used under the price adjustment clause and they likewise contain the data which the defendants contend should be used under the price adjustment clause. The controversy, therefore, is a narrow one and resolves itself into the question as to which set of specific data given in the monthly publications should be used in [35] view of the provisions contained in the price adjustment clause.

The Department of Labor monthly bulletins are labeled "Average Wholesale Prices and Index Numbers of Individual Commodities," followed by the month and year and contain the average of the market prices for that month for each of about 850 major commodities. Each commodity has a permanent code or commodity number which does not change from month to month and the code number is merely for the convenience of identifying the particular commodity referred to. The monthly bulletin does not describe the particular commodity other than by a reference to its code or commodity number, but the annual bulletin such as Bulletin No. 920 covering the year 1946 gives to each commodity in the source data a code number followed by a description of the commodity. For example, the first commodity listed in the monthly bulletin bears code No. 1.1. A reference to the Bulletin No. 920 shows that this code number represents Barley, No. 2, malting, Minneapolis. The last commodity listed in the monthly bulletin has a code number of 784.1

which identifies it as Wax, crude white, f.o.b. New York refinery. The monthly bulletin refers to this code number as a "commodity number" in the left hand column. The annual bulletin refers to this number as "code number." Under this system, copper bears a code number of 472.1 and lead a code number of 473. (See Page 87 of the annual bulletin No. 920.) Other data issued by the Department of Labor classifies each commodity into on of three classes:

1. Manufactured articles;
2. Semi-manufactured articles;
3. Raw material.

Lead and copper are classified as semi-manufactured articles. Such articles as automobiles, farm machinery, etc., are classified as manufactured articles.

The monthly source data of the Department of Labor gives the commodity number in the first column, the next column to the right [36] gives the average price of that particular commodity for the month in question; the next column to the right gives the index number of the particular commodity. For example, copper identified by commodity number or code number 472.1 had an average price in January of 1946 of 12c per pound and it carried an index number of 85.4 for the same month. The index number gives a comparison of the 1946 price for that month as compared to the average price of that commodity in 1926 which for the purpose of index numbers is taken as equal to 100. If the monthly price for copper for example exceeds the

1926 base price, the index number would likewise exceed 100 and, generally speaking, where the price of a commodity increases month by month, the index number likewise increases month by month on a substantially parallel line. The commodity prices given in the Bureau of Labor data are often based upon different units of the product. For example, the prices with respect to copper and lead are given on the one pound unit. Quicksilver is given on the unit of a 76 pound flask. The prices on farm products are usually given by the bushel. Cattle, hogs, sheep, etc., by the 100 pounds. In order, however, to compare increases or decreases in prices of the various commodities listed in the Bureau of Labor data, current prices are related back to 1926 prices and for the same unit amounts index numbers are correspondingly given which then can be related to the index numbers of other commodities and thus index numbers of groups, subgroups, etc. are made available.

Obviously, the basic data therefore is the data relating to the individual commodity price and its individual index number. With this basic data any sort of grouping of the individual commodities may be made. The Bureau of Labor in addition to giving the individual commodity prices and index numbers for each separate commodity gives an index number of all the 860 commodities as an entire group and also gives index numbers of numerous subgroups. For example all commodities as a group (650 in number) had an index number of

141.5 for January, 1947, and index numbers for various subgroups, for example, farm [37] products for January, 1947, 165.0; dairy products as a subgroup under farm products 164.6, Metals and Metal Products as as one of the 10 subgroups 138.0; nonferrous metals, a subgroup under Metals and Metal Products, 130.5. No average prices are given in the Bulletin as to all commodities as a group, or as to any of the main groups or subgroups, but prices are given only with respect to individual commodities.

Since the price adjustment clause in this contract refers to the monthly bulletins of the Bureau of Labor it was necessary to look to these bulletins which run from April, 1946 to March, 1947. Long afterwards, however, there was and now is available printed Bulletin No. 920 entitled "Wholesale Prices, 1946" which gives all of the data with respect to prices and index numbers of individual commodities and index numbers only of groups and subgroups for the entire year and for each month in the year of 1946. As stated, however, these annual permanent bulletins are not printed and issued, we are advised, until approximately two years after the year in question. (See transmittal letter in Bulletin No. 920 dated May 8, 1948 on the Wholesale Prices Bulletin No. 920 for 1946.)

A reference to certain pages of this Bulletin No. 920 will clearly illustrate what we have heretofore attempted to explain and will also clearly illustrate the narrow scope of the controversy which exists

between the plaintiff and the defendants. If the Court will turn to Pages 86 and 87 of Bulletin No. 920 it will be seen that these pages are a part of Table 12 entitled "Primary market prices, index numbers, and relative importance of individual commodities, 1946." The upper half of the table on Page 86 gives in the left hand column the code number of the individual commodity; the next column gives a description of the commodity and the terms of sale; the next column gives the unit on which the price is computed; the next twelve columns give the average primary market prices for each month in 1946; the last column gives the average [38] market price for the year. On Page 86 under the sub-heading "Nonferrous metals" will be found code number 472.1 Copper, electrolytic, delivered Connecticut Valley; the pound unit and the price of copper per pound for each month in 1946 being $.120 in January and running up to $.195 in December. Similarly for lead, code number 473 on the pound basis $.065 per pound in January to $.122 per pound in December. It will be noted that the subgroup "Nonferrous Metals" as a group contains no price data.

The lower half of this Table 12 is given on Page 87 and the heading is "Indexes (1926=100) Of Primary Market Prices, 1946." From it will be seen that code number 472.1 for copper carried an index number of 85.4 in January and rose to 138.8 in December. This indicates that for the months of January, February, March, April and May the

price of copper was below the 1926 price and in the following months was above the 1926 price. Another illustration on Page 86 is seen in quicksilver, code number 476, unit 76 pound flask, which had a price of $106.50 in January but decreased to a price of $88.375 in December. The lower half of the Table on Page 87 with respect to quicksilver shows that its index number in January was 143.6 indicating a price considerably above the 1926 price and it decreased to an index number of 94.9 in December indicating that it was then somewhat below the 1926 price.

It is the contention of the plaintiff that the price adjustment or escalator clause requires the use of the index numbers for copper and lead given in the monthly bulletins of the Department of Labor, a compilation of which may be seen for the months of 1946 on Page 87 of Bulletin No. 920. As stated, additional index numbers for January, February and March must be taken from the monthly bulletin. (We understand the 1947 annual printed bulletin is not yet available.) On the contrary, it is the defendants' contention that no reference whatsoever is to be made to the index numbers of lead and copper and that the price adjustment clause requires the use of the monthly [39] bulletin data relating only to the index numbers of the group of Metals and Metal Products as an entire group. Such an index number is given in the monthly publications of the Bureau of Labor. (See, for example, on Page 75 of Bulletin No. 920 where for Metals

and Metal Products as a whole, index numbers are given for each month in 1946 beginning with 105.7 in January to 134.7 in December.) But a glance at the upper portion of Table 12 on Page 74 will show that no prices are assigned to Metals and Metal Products as a group. Similar index numbers covering all the commodities as a whole and index numbers of the main groups under all commodities and the subgroups under the main groups could be taken from Table 1 on Pages 11 and 12 of Bulletin No. 920, but again no prices are given to such groups and subgroups.

We understand that the defendants agree with the plaintiff that if the index numbers of copper and lead are to be used, the plaintiff has selected the proper index numbers. On the other hand, the plaintiff and defendants are in agreement that if the index numbers for Metals and Metal Products as an entire group are to be used that the defendants have selected the proper figures from the Bureau of Labor tables. If defendants' data is used, the plaintiff has been paid in full and no additional amount would be recoverable in this action. On the other hand, if the plaintiff's data is to be used under the terms of the price adjustment clause, plaintiff is entitled to recover the sum of $9,996.69, together with interest thereon.

The monthly Bureau of Labor publications, as stated, carry individual commodity prices and index numbers of approximately 850 individual items. There are 141 individual items grouped under

Metals and Metal Products. Of these 141 items, 111 are manufactured articles such as automobiles, farm machinery, etc., 27 are semi-manufactured articles (the class in which copper and lead fall) and 3 are classed as raw material. These facts and other data appearing in the monthly [40] and annual publications of the U. S. Department of Labor will be referred to in the portion of our Points and Authorities under the heading of "Argument." While the monthly publications to which the price adjustment clause refers do not contain a column which appears in Table 12 under the heading "Relative Importance, Year 1946," we wish to refer to this column in Bulletin No. 920 as a basis for comments which we may make under our heading of "Argument." On Page 39 of the Bulletin No. 920 at the commencement of Table 12 the Relative Importance for the year 1946 of all commodities is given as 100. Under the similar column throughout the Table are given the Relative Importance of the various groups and subgroups and the Relative Importance of each individual item. If the Court will turn to Page 76 of the Bulletin No. 920 it will be seen that the relative importance of Metals and Metal Products as a group is given as 13.32. This indicates that the Bureau of Labor has assigned this relative importance to the group of Metals and Metal Products with respect to all commodities taken as a whole. Page 87 of the Bulletin No. 920 shows that copper is given a relative importance with respect to all commodities of .47 and

lead of .15 and nonferrous metals as a group is given a relative importance of 1.69, whereas, immediately above it will be seen that Motor Vehicles as a group are given a relative importance of 5.21, indicating that under the Metals and Metal Products group as a whole, motor vehicles have a relative importance of approximately three times that of all of the nonferrous metals as a group. [41]

IV.

Argument

Since the contract here involved deals with the manufacture and sale of electrical cable composed mainly of copper and lead and since the contract contains a price adjustment or escalator clause for the adjustment upward or downward of the contract price depending upon the increased or decreased cost to the manufacturer of the material in the cable, the escalator clause should be construed to carry out the intentions of the parties. In order to arrive at such intention, the contract, its subject matter and the Bureau of Labor Statistics to which it refers must all be considered in order to arrive at a fair, just and reasonable interpretation of the price adjustment clause.

We think it is obvious that a reference to the Bureau of Labor Statistics showing the increase in the cost of copper and lead are far more appropriate and more accurate and more truly carry out the intentions of the parties than a reference to an entire group of Metals and Metal Products. As

we have heretofore stated, some 140 different commodities or articles, the greater proportion of which (110 out of 141) are strictly manufactured articles are grouped under the group of Metals and Metal Products. In these manufactured articles the price would be greatly affected by the labor involved in their manufacture. Lead and copper, however, while classed as semi-manufactured articles are not manufactured articles in any such sense as are automobiles, agricultural machinery, plumbing supplies, etc. There is no conceivable reason, that we can think of, why either the Department of Water and Power or The Okonite Company should deliberately choose a method of arriving at increased or decreased costs to the manufacturer which had no accuracy whatsoever and would not in fact be a true reflection of such increased or decreased costs. The accurate statistics covering copper and lead are as readily [42] available as the general average of the entire group of Metals and Metal Products. Defendants' Answer demonstrates this. On Page 10 of defendants' Answer the only index numbers that need to be taken from the Bureau of Labor Statistics to compute the increase or decrease of material costs based on copper and lead are those shown in Columns 2 and 3 for the months of April, 1946 to March, 1947. Defendants' contention with respect to the interpretation of the escalator clause would require the use of the index numbers set forth on Page 15 of defendants' Answer for the same months.

It cannot reasonably be argued that there is any convenience in the use of one set of index numbers over the other. On the other hand, this very litigation conclusively demonstrates the inaccuracy and inappropriateness of using the index numbers relating to Metals and Metal Products as a whole as distinct from those relating to lead and copper. On the defendants' construction of the escalator clause only approximately one-third of the actual additional costs of the lead and copper material in the cable would be taken into consideration, whereas, under the plaintiff's construction of the escalator clause the full increase or decrease in cost of copper and lead would be considered.

As the defendants' Answer shows there was no controversy with respect to the increase in labor costs. The escalator clause appropriately referred to Department of Labor Statistics relating to the increase or decrease in labor costs based on the index of hourly earnings of the electrical equipment manufacturing industry. (See Page 4 of defendants' Answer.) This constituted a reasonable, accurate and efficient method of determining either increased or decreased labor costs and plaintiff's construction of the escalator clause, which we believe to be correct, affords an equally reasonable, accurate and convenient method of determining the increases or decreases in costs of lead and copper containing in the cable.

Defendants' contention with respect to the escalator clause [43] would clearly have the effect of

substituting for an accurate method of determining increased or decreased material costs, a speculative, inaccurate and perhaps even a gambling contract between the manufacturer, The Okonite Company, and the defendant purchasers. It would almost be equivalent to saying that increased or decreased cost of material in the cable would be governed by the increased or decreased costs of diamonds in South Africa. It is not conceivable to us that the Department of Water and Power of The City of Los Angeles would propose or should by any possibility expect a contractor to interpret the escalator clause used in this contract to mean that if copper and lead decreased in price subsequent to the Base Month of April, 1946, whereas the composite group price of Metals and Metal Products had increased, that the contractor, where his manufacturing costs had decreased, would expect to receive from the Department of Water and Power and the Department of Water and Power would expect to pay a substantial added amount to the contract. The defendants may argue that this could not happen and that a reference to the Bureau of Labor figures as to Metals and Metal Products as a group would give an approximate measure of increased or decreased costs of any metal in this group. A slight reflection and a mere superficial examination of the Bureau of Labor Statistics will show the fallacy of such an argument. We have already heretofore pointed out one example with respect to quicksilver, one of the nonferrous metals under Metals and Metal

Products, which carried a price in April (the Base Month of the contract) of 104.50 per 76-pound flask and steadily declined in price until in December of that year the price was $88.37½. (See Page 86 of Bulletin No. 920—upper half of Table.) Correspondingly in the lower half of the Table on Page 87 in will be seen that the index number of quicksilver correspondingly declined from 111.9 in April to 94.9 in December. It is obvious, therefore, that if the City had entered into a contract dealing with quicksilver listed as one of the metals in the Metals and Metal Products Group, [44] the manufacturer's costs would have been decreased and yet under defendants' construction of the escalator clause the Department of Water and Power would have paid a very substantial additional sum because of the general increase of the index numbers of Metals and Metal Products as a group.

If a person were merely interested in the general question of the increase or decrease of living costs or the general average of innumerable items or the general average of increased or decreased costs of the 140 items (mostly manufactured articles) under Metals and Metal Products, a consideration of the movement upward or downward of the group as a whole would be appropriate but here we are concerned with an escalator clause which the parties must have used not for speculative purposes but for the legitimate purpose of fairly adjusting the contract price depending upon increases or decreases in material costs in this cable. Due to the

postwar conditions and due to O.P.A. regulations then in force both parties knew of the shortage of materials and the impossibility of foreseeing over the future months of the contract the costs of material and of labor which would be involved in the manufacture of this cable. Doubtless it would have been impossible for the City of Los Angeles to obtain bids from responsible manufacturers of this cable without the device of an escalator clause, and if an escalator clause was reasonably called for such an escalator clause should be given a reasonable interpretation if it is in anywise to carry out the obvious purpose of such clauses and the intention of the parties.

We call the Court's attention to the fact that "Group VI—Metals and Metal Products," (Page 11 of the contract and quoted also on Page 5 of defendants' Answer) to which the escalator clause makes reference, nowhere appears in either the monthly publications by the Bureau of Labor or in its annual publication, other than in Table 11, Page 35 of Bulletin No. 920 which, obviously, was not the Table intended to be referred to since "Group VI" in that Table deals with [45] Material handling equipment such as industrial trucks, hand trucks, conveyors, hoists, freight elevators, locomotive cranes. And yet defendants' contention that the escalator clause refers to the group of Metals and Metal Products as a whole seems to us just as meaningless as it would be to refer to

"Group VI" of Table 11 dealing with power and hand trucks, conveyors and locomotive cranes.

When the contract was made there was an acute shortage of lead and copper. Under the heading Metals and Metal Products on Page 9 of Bulletin No. 920 the O.P.A. controls with respect to Metals and Metal Products are dealt with and it is stated: "Prior to decontrol, ceilings for copper, lead, and zinc were advanced. The shortages in these metals became more acute during the lapse of OPA controls and subsidies in July, with trading virtually at a standstill. * * * After controls were terminated in November, there were further sharp increases for basic nonferrous metals."

Defendants undoubtedly will attempt to emphasize and greatly rely upon the quoted phrase "Group VI—Metals and Metal Products" contained in the escalator clause but in this same clause the Court will note the phrase "increases in material costs " * * * "index of wholesale prices for Group VI—Metals and Metal Products." (Underscoring supplied.) The underscored words "wholesale prices" are nowhere given as to Metals and Metal Products as a group. The only prices which are given in the Bureau of Labor Statistics relate to individual commodities and taken as a whole it seems to us impossible to give to this escalator clause any such construction as it contended for by the defendants.

We have earlier pointed out that the general escalator clause (subsection c Page 12 of the con-

tract) (Page 7 of the Answer) provides that if for any reason the statistics compiled by the United States Department of Labor and referred to above, are not available for use in connection with adjustment in the contract price, adjustment will then be made by means in similar indices. In such event, the [46] selection of substitute indices will be made by mutual agreement of the parties to this contract. Since the grouping of individual commodities in the Bureau of Labor Statistics is more or less arbitrary, it seems impossible to imagine that the parties to this contract could have found any other available statistics which would group under such a group as Metals and Metal Products all of the 141 items which are contained in the Bureau of Labor's group or that other available statistics would carry index numbers for the group as a whole. This would be extremely unlikely unless some other compilor of similar statistics would adopt wholesale the precise form that these statistics take under the publications issued by the Bureau of Labor Statistics. On the other hand, said subsection c is reasonably appropriate and adequate if the parties had in mind, as they must have had, the increase or decrease of the cost of copper and lead since these actual costs could be obtained from various sources.

As bearing upon the proper construction of the price adjustment or escalator clause b (Page 11 of the contract, Page 4 of the Answer) we call the Court's attention to the fact that this clause makes

reference to "monthly material index figures." This phrase is used in clause b three times. It is used in the immediately following clause c dealing with a decrease in material costs an equal number of times. This phrase is not found anywhere in the Bulletin No. 920 or in the monthly bulletins compiled during the period covered by this contract. The heading of Table 12 on each page of the Table, beginning on Page 38 to the end thereof, uses the terms: "Primary market prices, index numbers, and relative importance of individual commodtiies, 1946." The title of the Bureau of Labor publication mimeographed and printed monthly by the Bureau of Labor Statistics is entitled "Average Wholesale Prices and Index Numbers of Individual Commodities." We do not contend that in and of itself the use in the price adjustment clause of the phrase "material index figures" as distinct from index numbers as used in the Bureau of Labor publications is of particular importance, [47] but it does establish that clauses b and c of the escalator clause in the contract are not artfully drawn and, therefore, it is unreasonable for the defendants to attempt to give any particular significance to the phrase "Group VI—Metals and Metal Products" as quoted in clause b, particularly when, as we have stated, the immediately preceding phrase is "index of wholesale prices" when in fact no wholesale prices are anywhere given either in the monthly or annual publication with respect to Metals and Metal Products as a group. Index numbers are

given but, of course, are based upon an average of all of the individual index numbers of the 141 commodities grouped under Metals and Metal Products. In our opinion, the only significance that can properly be given to the phrase "Group VI—Metals and Metal Products" is that it refers to a convenient place in the publication wherein the accurate index numbers of lead and copper may be found.

We have also pointed out that another clause designated as clause b which appears on Page 12 of the contract provides that in determining the adjustment in contract price the percentage of increase or decrease in labor or material costs will be calculated to the nearest 1/10th of 1%. If the City ever contemplated in a contract dealing with cable, mostly composed of copper and lead, that the yardstick to measure an adjustment of the contract price should be the group of Metals and Metal Products as a whole, such insignificant inaccuracy of 1/10th of 1% would be astonishing at the least. It is true that mathematical computations must stop at some decimal point, but this clause only would appear to make sense if the basic yardstick by which and adjustment of the contract price is to be measured is an accurate measure. Otherwise it is a good deal like having an escalator clause to adjust the price of gold per ounce down to 1/10th of 1% and then to provide that the gold in question shall be weighed upon crude scales where a matter of ounces could not be detected.

The Bureau of Labor itself admits that the index

numbers assigned to Metals and Metal Products as a group are subject to [48] important inaccuracies due to the fact that motor vehicles, one of the subgroups under the group of Metals and Metal Products, were not produced for civilian sale during World War II and consequently the Bureau of Labor Statistics carried forward the 1942 prices of Motor Vehicles through the month of September, 1946. Thereafter their actual prices were used in computing the tables and this immediately was reflected not only in the index numbers of motor vehicles as a subgroup but in the group of Metals and Metal Products as a whole. If the 1942 prices of motor vehicles had been carried throughout the year of 1946 the year's average index number for Metals and Metal Products would have been 112.3, whereas due to the change mentioned, the year's index number shown on Page 75 of the bulletin for Metals and Metal Products is 115.5. This artificial effect upon the index number of Metals and Metal Products as a group and of motor vehicles as a subgroup is explained in the footnote to Table I on Page 12 of Bulletin No. 920. These facts additionally demonstrate the unreliability and unreasonableness of referring to index numbers of Metals and Metal Products as a group as compared to referring to the index numbers of lead and copper in connection with the price adjustment clause under this contract. We may further point out that even the grouping of commodities in the Bureau of Labor indexes is to a large extent arbitrary

inasmuch as certain commodities are included in more than one commodity group and the Bulletin warns that this duplication must be kept in mind by anyone making special group indexes from the Bureau of Labor Statistics. (See Pages 2 and 3 of Bulletin No. 920.) It is there further stated "Thus prices of 23 commodities are included in both the farm and food indexes, and prices of 23 other commodities are included in both the metals and metal products and building materials groups."

We have already pointed out that of the 140 individual commodities or articles listed under Metals and Metal Products, for which individual prices are given in the upper half of Table 12 [49] and index numbers in the lower half of Table 12, approximately 110 of these commodities or articles are manufactured articles or commodities. For example, of the commodities listed under the Agricultural implements and farm machinery, the first subdivision under Metals and Metal Products, are strictly manufactured articles. Of those listed under the second subdivision, Iron and Steel, about 44 are strictly manufactured articles or products. Under the third subdivision, Motor Vehicles, passenger cars and trucks are both manufactured articles. Under the Nonferrous Metals Group, 9 are manufactured articles and 11 are semi-manufactured articles. Copper and lead are classed as semi-manufactured articles. Under the final subdivision of Plumbing and Heating, all 8 commodities are classed as manufactured articles. In the whole list

of Metals and Metal Products, 3 commodities are listed as raw material. Totaling these figures it appears out of approximately 140 articles or products listed under Metals and Metal Products 110 are manufactured articles, 27 semi-manufactured and 3 raw materials.

All of these facts when considered in connection with the obvious purpose of price adjustment or escalator clauses lead, we believe, to only one conclusion, namely, that the price adjustment clause is to be construed as referring to the increased costs of materials actually used in the lead and copper cable and not to any average increased costs of some 140 commodities most of which are manufactured and have no reasonable relation to copper and lead.

We were advised at a pre-trial conference with counsel for the Department of Water and Power that the defendants will offer in evidence certain interim invoices dealing with shipments of cable under the contract which contained computations from the Bureau of Labor Statistics relating to Metals and Metal Products as a group rather than to lead and copper. Their admissibility in evidence or their materiality is not conceded. Such invoices were in fact sent to the defendant, The Department of Water and Power. The contract, however, as we have pointed out specifically provides that the final payment [50] for increase or credit for decrease in the contract price resulting from the price adjustment clause "will be deferred until the time

of final payment under the terms of the contract." (See subdivision d Page 12 of the contract.) After the final shipments of cable and in accordance with the contract, the plaintiff sent to the Department invoice No. C 247 dated September 29, 1947 headed "Adjustment of billings on Contract 9317-B in accordance with escalator clause," with attached schedules which showed the increased price under the escalator clause based upon the copper and lead data given in the United States Department of Labor Statistics, and in this invoice there was a credit for all payments theretofore made under the interim invoices. The interim invoices containing additions under the price adjustment clause relating to the increased cost of materials accounts for only approximately $1,283.01 of the total amount claimed by plaintiff under the price adjustment clause and said amount of $1,283.01 was divided among said interim invoices. As we have stated, we do not know why the Department of Water and Power made any payments with respect to the escalator clause upon these interim invoices since the contract, as indicated, provided for an adjustment under the escalator clause at the time of final payment under the terms of the contract. Since the calculation under the escalator clause was at most a mere mathematical calculation it is not surprising and certainly not controlling that interim invoices failed accurately to reflect the true interpretation of the escalator clause. The Department of Water and Power has not claimed any prejudice

by virtue of these interim invoices and has, as we have stated, been given full credit for all amounts paid thereunder.

The fundamental rules to be followed in interpreting contracts are well settled and we think that it will be more than sufficient in this preliminary memorandum to merely refer to the more important California Code provisions dealing with this subject matter and one or two recent California cases. [51]

Section 1636, Civil Code of California

> "Contracts, how to be interpreted. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

Section 1639

> "Interpretation of written contracts. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title."

Section 1641

> "Effect to be given to every part of contract. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Section 1643

> "Interpretation in favor of contract. A contract must receive such an interpretation as

will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

Section 1648

"Contract restricted to its evidence object. However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." [52]

Where a contract is possibly susceptible of two interpretations, one of which is reasonable and fair and the other of which is unreasonable and will lead to absurd results, the latter interpretation must be discarded and the first accepted.

We quote from the case of Cohn v. Cohn, 20 Cal. (2d) 65 at 70 where the Supreme Court said:

"Another factor which is entitled to consideration in construing the agreement is that if the contention of the appellants were correct and $94,886 of the tax is deducted from the interest of Levi Cohn under the will, the respondent will receive only about 30 per cent of the estate, based upon a market value of $650,000. On the other hand, if the entire tax is deducted from the value of the estate before it is apportioned among the heirs, the respondent will receive 45 per cent of the amount 'available for distribution.' Where one construction would make a contract unreasonable or unfair,

and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter construction is the one which must be adopted." (Emphasis added.)

Cohn v. Cohn, 20 Cal. (2d) 65 at 70. [53]

Without lengthening this memorandum to state the facts in the following cases, we quote portions of a few additional California cases dealing generally with the construction of contracts.

Universal Sales Corporation, Ltd. v. California Press Manufacturing Company, 20 Cal. (2d) 751, 761

"As an aid in discovering the all-important element of intent of the parties to the contract, the trial court may look to the circumstances surrounding the making of the agreement (Civ. Code, Sec. 1647; Smith v. Carlston, 205 Cal. 541, 550, (271 Pac. 1091); Katz v. People's Finance & Thrift Co., 101 Cal. App. 552, 558 (281 Pac. 1097); Meyers v. Nolan, 18 Cal. App. (2d) 319, 322 (63 P. (2d) 1216); 12 Am. Jur. 784, Sec. 247), including the object, nature and subject matter of the writing (First National Bank v. Bowers, 141 Cal. 253, 262 (74 Pac. 856); Weaver v. Grunbaum, 31 Cal. App. (2d) 42, 48 (87 P. (2d) 406); 12 Am. Jur. 776, Sec. 242), and the preliminary negotiations between the parties (Belfour v. Fresno Canal & Irr. Co., 109 Cal. 221, 226 (41 Pac. 876); 12 Am. Jur. 757, Sec. 234), and thus place itself in the same situation in which

the parties found themselves at the time of contracting. (Code Civ. Proc., Sec. 1860; Tennant v. Wilde, 98 Cal. App. 437, 445 (277 Pac. 137); Pacific Indemnity Co. v. California Electrical Works, Ltd., 29 Cal. App. (2d) 260, 272 (84 P. (2d) 313); 17 C. J. S. 744, Sec. 321)."

Universal Sales Corp. v. Calif. Press Mrg. Co. 20 Cal. (2d) 751, 761. [54]

Yeremian v. Turlock etc, Co. Inc. 30 Cal. App. (2d) 92, 96

"'A contract must receive such interpretation as will make it reasonable. (Civ. Code, Sec. 1643; 6 Cal. Jur., Contracts, Sec. 269, p. 271.) Here, the interpretation urged by defendant would render the contract unreasonable and unfair, and its language does not require such interpretation." Yeremian v. Turlock etc. Co. Inc. 30 Cal. App. (2d) 92, 96.

Caletti v. State (1941) 45 C. A. (2d) 302, 305

"It is well settled that if one construction of a contract would make it unreasonable, unfair or unusual, and another construction would make it fair, reasonable and just, the latter construction must be adopted. (Stein v. Archibald, 151 Cal. 220 (90 Pac. 536).) It would seem that here the correction was properly called into use, for it cannot be assumed the contractor was agreeing to take less pay for material actually handled, or that the state

was assuming to pay for more yardage than actually removed by the contractor."

Caletti v. State (1941) 45 C. A. (2d) 302, 305.

The same rules for the construction of contracts announced by the foregoing California Code Sections and California cases are followed in the Federal cases. See, particularly, Lesamis v. Greenberg (CCA 9)* (1915) 225 Fed. 450, 451-452, reaffirmed 250 Fed. 848 (May 6, 1918 cc 9). Suit was brought by plaintiff to obtain the dissolution of the mining partnership between defendant, Tyapay, Garbin and plaintiff and for an accounting. The three last named [55] persons deeded to defendant an undivided one-fourth of certain mining properties then held by them in consideration of the $6,000 at the time paid by defendant and of $24,000 to be paid to them by defendant "out of the first money taken out of the ground." The parties commenced mining the properties as a partnership in March, 1910, and continued such operations until 1911 when a dispute arose resulting in this suit. The district court made certain findings and among other things found as to the $24,000 deferred payment that it was payable from the net proceeds of the mining operation and not from defendant Greenberg's one-fourth interest therein. In effect its holding was that the balance of the purchase price was to be paid from the net proceeds of the mining operation, i.e., that all of the net product of the mines was to be applied in discharge of such balance. The district court's construction of this

instrument was predicated on the acts and conduct of the parties in their interpretation of its terms. The Ninth Circuit modified this finding stating that the district court was in error and that the contract was susceptible of no such construction. It further stated that the act or conduct of the parties in interpreting the instrument was not to be followed where the instrument could be interpreted by taking the four corners and viewing it as a whole. The court states:

> "The District Court was induced, by reason of the acts of the parties and their seeming construction of the paper, to hold that such balance of the purchase price was to be paid from the net proceeds of the mining claims, which means that all the net products of the mines was to be applied in discharge of such balance. It must be conceded that the stipulation does not so read. It is plain that the payment does not become due until the money is taken out of the ground, and, by reason of the contingency, [56] might never mature. But the controlling idea respecting the construction of the paper is that Greenberg was purchasing a one-fourth interest only, and was to pay $30,000 for that interest, $6,000 of which he paid in cash. The balance he was to pay when the money was taken out of the ground; not he and his partners, nor the firm. He could pay that, therefore, only out of his interest in the money taken out of the ground. Otherwise his partners would be con-

tributing three-fourths of the money to pay his obligation to them. This could not have been intended, and the contract is susceptible of no such construction. Of course, the manner of the parties' treatment of the contract and its stipulation is often an aid to construction of the instrument, where the terms are ambiguous and their meaning involved. But, where the contract can be rendered by taking it by the four corners and viewing it as a whole, that manner of interpretation is most satisfactory, and should be adopted. So construing the contract, the plain meaning of the words 'of the first money taken out of the ground' is the first money taken out of the ground to which the grantee was entitled, which would be one-fourth of the amount so taken. And the intendment is that the first money shall be the gross amount to which the grantee is entitled, and not the net. We think therefore the trial court was in error in its interpretation of the contract." (Emphasis added.)

Lesamis v. Greenberg, 225 Fed. 450, 451, 452. [57] After this case was remanded, the District Court revised its findings in accordance with the opinion of the Circuit Court and thereafter a subsequent appeal was taken which is reported in 250 Fed. 848. The opinion was written by Circuit Judge Ross and concurred in by Circuit Judges Hunt and Gilbert reaffirming the opinion in 225 Fed. 450, and

actually quoting the portion of the opinion which we have hereinabove set out.

Conclusion

It is submitted that plaintiff's construction of the price adjustment clause contained in this contract makes it fair, accurate and reasonable, and that defendants' construction of the clause would make it unfair, unreasonable and inaccurate and would commit the parties to a pure speculation, separate and apart from any actual increased or decreased costs of the material embodied in the cable. Defendants' construction of the price adjustment clause, we submit, must obviously defeat its real purpose and the intention of the parties.

Respectfully submitted,

STEPHEN A. WILSON,
GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY

By /s/ HENRY F. PRINCE,

Attorneys for Plaintiff, The Okonite-Callender Cable Company, Incorporated.

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 18, 1949. [58]

[Title of District Court and Cause.]

DEFENDANTS' MEMORANDUM PRIOR TO TRIAL

Statement of Facts

A contract was executed May 21, 1946, by the defendant Department of Water and Power of the City of Los Angeles, hereinafter called the "Department," and the Okonite-Callender Cable Co., Inc., a corporation, hereinafter called the "Plaintiff," for the furnishing and delivering to the Department by the plaintiff of six different sizes of paper insulated lead covered cable for $91,096.00, which amount was to be adjusted on account of increases in labor costs and on account of [60] increases in material costs. Deliveries were begun and completed on the contract specified dates at Los Angeles of fixed quantities of each size of cable.

Section F 1.3 of the contract entitled "Price Adjustment Clause" (contract, pages 10 to 12), provided that the contract price ($91,096.00) was subject to adjustment for changes in labor and/or material costs, to be determined as follows:

For the purpose of adjustment, the portion of the contract price representing labor was twenty per cent ($18,219.20). This amount was to be adjusted for increases in labor costs based on the index of hourly earnings of the "Electrical Equipment" Manufacturing Industry, compiled monthly by the United States Department of Labor, Bureau of Labor Statistics. The average of monthly labor index figures for the period from the Base Month

(April, 1946), to and including the month specified for final shipment, was to be computed and the percentage increase, if any, secured by a comparison of the average monthly labor index figure, with the labor index figure for April, 1946. The percentage of increases was to be applied to the twenty per cent, and the result would be the amount of increase in the contract price on account of increases in labor costs. Provision was also made for decrease in labor costs, which is not pertinent here.

There is no issue in this case on the amount of increase in labor costs. Issue is joined on the proper interpretation of the contract provisions regarding the adjustment in the contract price for increases in material costs.

The "Price Adjustment Clause" further provided that for the purpose of adjustment of the contract price, the [61] portion of the contract price representing material was accepted at fifty per cent. Using this amount and April, 1946, as the "Base Month," the contract provided:

> "The . . . amount . . . will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for 'Group VI-Metals and Metal Products' compiled monthly by the U. S. Department of Labor. The average of the monthly material index figures for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average

monthly material index figure with the material index figure for the Base Month. The adjustment for increases in material will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing material, as indicated above, and the result will be accepted as an increase in the contract price."

Payment for increase in the contract price resulting from these provisions was to be deferred until the time of the final payment under the terms of the contract, which was to be within approximately thirty days after delivery to the Department. The percentage of increase in labor and material costs was to be calculated to the nearest one-tenth of one per cent. The total price was not to be increased by more than thirty per cent, or $27,328.80, over the original bid price of $91,096.00. Plaintiff's claimed adjustment is within the thirty per cent limit. It was further provided that the price was not [62] to be increased by virtue of the adjustment in excess of the applicable maximum price established at the date of delivery by the OPA pursuant to the Emergency Price Control Act of 1942. Deliveries were made between July 25 and November 9, 1946, while OPA was in effect.

Plaintiff furnished and delivered all of the material in accordance with the terms of the contract. The Department has paid the plaintiff $91,096.00, plus taxes, together with $1,392.85 an account of increases in labor costs, plus taxes, and together with $4,205.48 on account of increases in

material costs, plus taxes thereon, making a total payment by the Department to the plaintiff of $96,694.33, plus taxes.

The United States Department of Labor, Bureau of Labor Statistics, compiled and published monthly an index of wholesale prices entitled "Index Numbers of Wholesale Prices by Groups and Subgroups of Commodities" (1926=100) for April, 1946, through March, 1947, which is the contract period involved, in a mimeographed release showing the index divided into ten groups, the sixth one of which is entitled "Metals and Metal Products." It also prepared Bulletin No. 920, "Wholesale Prices, 1946," printed by the United States Government Printing Office on page 11 of which appears Table 1, "Index Numbers of Primary Market Prices by Groups and Subgroups of Commodities, 1946," setting forth the monthly material index figures for April through December, 1946, for the sixth group, "Metals and Metal Products." For the remainder of the contract period of January, February and March, 1947, the index numbers for the ten groups, including the sixth group, "Metals and Metal Products," are in the mimeographed releases of the United States Department of Labor, Bureau of Labor Statistics, dated [63] February 25, 1947, March 26, 1947, April 23, 1947 (revised April 30, 1947) and May 22, 1947. These monthly material index figures so published and released monthly (April, 1946, through March, 1947) for the sixth group, "Metals and Metal Products" are as follows:

MONTHLY MATERIAL INDEX FIGURES

Month)		(Group VI)	(Average)	(Increase)	(Increase)
pr.	1946	108.8			
[ay		109.4			
une		112.2			
uly		113.3			
ug.		114.0			
ept.		114.2			
ct.		125.8	114.0	5.2	4.8%
ov.		130.2			
ec.		134.7			
an.	1947	138.0	120.1	11.3	10.4%
eb.		137.9			
ar.		139.9	123.2	14.4	13.2%

The average of these monthly material index figures from April, 1946, to the months of October, 1946, and January and March, 1947, the months specified in the contract for final shipments are 114.0, 120.1 and 123.2, respectively. The amount of increase shown by the average monthly material index figure compared with the index figure for April, 1946, for these months specified for delivery, is 5.2, 11.3 and 14.4. The resulting percentage increase is 4.8%, 10.4% and 13.2%. [64]

Multiplying these percentages by fifty per cent of the unadjusted contract price of the material, delivery of which was to be completed in the months of October, 1946, and January and March, 1947, equals $4,205.48, or the total amount of the adjustment for increases in material costs based upon the United States Department of Labor, Bureau of Labor Statistics, monthly compilation of index of wholesale prices for the sixth group, "Metals and Metal Products." This amount has been paid and defendants contend that amount is all that was pay-

able to plaintiff on account of increases in material costs under the contract.

The United States Department of Labor, Bureau of Labor Statistics, also publishes the "Monthly Labor Review," and the index of wholesale prices for the ten major groups and their subgroups for each month of the contract preiod of April, 1946, through March, 1947, are shown in the "Monthly Labor Review," Volume 62, No. 6, for June, 1946, through Volume 64, No. 5, for May, 1947, in Table No. 1, "Index of Wholesale Prices by Groups and Subgroups of Commodities," and Table No. 2, "Index Numbers of Wholesale Prices by Groups and Subgroups of Commodities." [65]

Points And Authorities

I.

The contract provision that the price will be adjusted for increases in material costs "based on the wholesale prices for 'Group VI—Metals and Metal Products' compiled monthly by the United States Department of Labor" clearly means the "monthly material index figures" for the entire group and not any unnamed or unspecified individual commodity or commodities of the 115 commodities included in the five subgroups comprising the entire sixth major group of "Metals and Metal Products."

II.

This case is before the Court on the ground of diversity of citizenship and is governed by the law of the State of California.

28 U.S.C.A., § 1652.

Erie R. R. Co. v. Tompkins (April 25, 1938), 304 U.S. 64, 82 L. ed. 1188, 58 s. Ct. 817, 114 A.L.R. 1487.

Cole v. Loew's, Inc. (March 29, 1948, United States District Court, Southern District of California, Central Division), 76 Fed. Supp. 872, 874.

III.

The contract is not ambiguous, as this Court can determine its meaning without any other guide than a knowledge of the simple facts on which from the nature of language in general its meaning depends. [66]

It is not reasonably or fairly susceptible to different construction, which it must be to make it ambiguous.

17 C.J.S. 685-687, § 294.

The language of a contract is to govern its interpretation, if the language is clear and explicit and does not involve an absurdity.

California Civil Code, Sec. 1638.

IV.

The contract is not ambiguous and no construction is allowable. A court will not resort to construction when the intent of the parties is expressed in clear and unambiguous language, but will enforce the contract according to its terms.

Ucovich v. Basile, Jr. (May, 1938), 26 C.A. (2d) 272, 277 13 C.J. 520.

V.

The contract is not ambiguous because the parties do not now agree upon the proper construction to be given its provisions.

National Pigments & Chemical Co. v. C. K. Williams & Co. (Eighth Circuit, 1938), 94 Fed. (2d) 792, 795.

VI.

The first rule respecting the interpretation of contracts is that the court may not apply one of the rules as an aid in its construction until the court is first satisfied that the language is fairly susceptible of two different [67] interpretations.

The court should not attempt to wrench the language from its ordinary meaning.

Beaumon v. Kittle Mfg. Co. (1932), 122 C.A. 547, 549.

VII.

Interpretation Of Contracts

"A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

California Civil Code, Sec. 1636.

"For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in this chapter are to be applied."

California Civil Code, Sec. 1637.

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the

writing alone, if possible; subject, however, to the other provisions of this title."

California Civil Code, Sec. 1639.

"The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which [68] case the latter must be followed."

California Civil Code, Sec. 1644.

Respectfully submitted,
/s/ RAY L. CHESEBRO,
City Attorney
/s/ GILMORE TILLMAN,
Chief Assistant City Attorney
Attorney for Water and Power
/s/ RUSSELL B. JARVIS,
Assistant City Attorney
/s/ GERALD LUHMAN,
Deputy City Attorney
Attorneys for Defendants

Receipt of copy acknowledged.

[Endorsed]: Filed Feb. 18, 1949. [69]

In the District Court of the United States, Southern District of California, Central Division
Honorable Leon R. Yankwich, Judge.
No. 8493-Y

THE OKONITE-CALLENDER CABLE CO., Incorporated,

Plaintiff,

vs.

DEPARTMENT OF WATER & POWER OF THE CITY OF LOS ANGELES, etc.,

Defendant.

DECISION

The above entitled cause heretofore tried, argued and submitted, is now decided as follows:

Judgment is ordered entered for the plaintiff in the sum of $9996.69, together with interest thereon at the rate of 7% per annum from the first day of March, 1947, and costs.

Comment

I am of the view that the only reasonable interpretation of the "escalator" clause is one which makes the price adjustment dependent upon the cost of the component materials of the cable as contained in the index of prices for " 'Metals and Metal Products' compiled monthly by the United States Department of Labor." The compilation which corresponds to this designation is that contained in Table 12, pages 74 et seq. of Bulletin No. 920, which is part of [71] Plaintiff's Exhibit 1, and which lists the price of lead and copper which constitutes over

90% of the materials which are combined into the cable. Any other construction, such as the construction which would make the price dependent upon the average of some 140 metals which are listed by the Department of Labor would be unrealistic. It is to be noted that, while the clause in the contract has the prefix "Group VI" before the designation, there is actually no such group in any of the documents before the court. The only manner in which it can be arrived at is by giving to the group summaries contained in Table 1 of the Labor Review of June, 1946, (Vol. 62, No. 6, p. 924) an arbitrary number which it does not bear. The designation in Column 1 of the Table is "Groups and Sub-Groups." The first designation under that title is "All Commodities." "Metals and Metal Products" is the seventh from the top. To give to it the numeral designation 6, we would have to omit the first designation "all commodities" from the document. We should not resort to such re-arrangements of official bulletins in order to make good a mistake that may have been made by some scrivener who thoughtlessly, in inserting stock clauses into a contract—boiler plate, as the defendant's counsel called them—gave a designation which did not appear in any of the official documents to which reference was made. Indeed, I feel that the only interpretation which saves this clause from complete nullity is the interpretation here adopted. As I stated at the trial, "cables" are not mentioned among the materials listed under "Metals and Metal Products." The only way of making the index applicable at all is to

take from it the prices of lead and copper which, as already stated, constitute more than 90% of the component parts of the cable. An examination of the cable shows that it is an [72] aggregate of metals each maintaining its form, capable of adequate measurement. As there is no fusion and change of structure of the component materials, the proportions can be, and actually were, computed mathematically.

And it is reasonable to assume that business persons dealing with such a commodity and providing for the adjustment of prices, had in mind as a basis the price of the component parts of this aggregate of two metals rather than the average of some 140 metals.

Hence the ruling above made.

Counsel for the plaintiff to prepare findings and judgment in conformity with Local Rule 7.

Dated this 28th day of February, 1949.

/s/ LEON R. YANKWICH,
U. S. District Judge.

[Endorsed]: Filed Feb. 28, 1949. [73]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled case having duly come on for trial on the 23rd day of February, 1949, at the hour of 10:00 o'clock a.m., before the Honorable Leon

R. Yankwich, Judge Presiding, Henry F. Prince, Esq., and Frederic H. Sturdy, Esq., of Gibson, Dunn & Crutcher appearing as counsel for plaintiff, and Russell B. Jarvis, Esq., Assistant City Attorney, and Gerald Luhman, Esq., Deputy City Attorney, appearing as counsel for defendants, and the said respective parties through their counsel having theretofore filed with the Court pre-trial memoranda under local Rule No. 12, and the Court having heard and considered the evidence, both oral and documentary, offered by the [74] respective parties, and the matter having been orally argued on February 24, 1949 by the respective attorneys for the parties, and the cause having been submitted to the Court for a decision, the Court being fully advised in the premises now makes its Findings of Fact as follows:

Findings of Fact

1. Plaintiff is now and was at all times herein mentioned a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of New Jersey, having its principal office at Paterson, N. J., and was and now is a citizen of the State of New Jersey.

Defendant, The City of Los Angeles, is now, and was at all times herein mentioned a municipal corporation duly organized, incorporated and existing under and by virtue of the laws of the State of California, having its principal office at Los Angeles, California, and said defendant was and now is a citizen of the State of California.

Defendant, Department of Water and Power of

the City of Los Angeles, is now, and was at all times herein mentioned, a department of The City of Los Angeles and was and now is a citizen of the State of California.

2. The amount in controversy herein exceeds the sum of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

3. On or about the 21st day of May, 1946, plaintiff and defendant, Department of Water and Power of the City of Los Angeles, entered into a written contract wherein and whereby plaintiff agreed to manufacture, sell and deliver and said defendant agreed to purchase certain paper insulated, lead covered cable, more particularly described as follows:

Item VI—35,000 ft. No. 2/0 5000 volt, 3 conductor, stranded.

Item VII—48,000 ft. No. 6 AWG, 5000 volt, 3 conductor, stranded. [75]

Item X—2,000 ft. 1,500 MCM, 600 volt, single conductor, stranded.

Item XIV—76,000 ft. 1/0, 600 volt, single conductor, stranded.

Item XV—100,000 ft. No. 4 AWG, 600 volt, single conductor, stranded.

Item XVI—80,000 ft. No. 6 AWG, 600 volt, single conductor, stranded.

4. That in and by said contract it was agreed that said cable should be furnished at the following base prices:

Item VI	$ 912.00 per M Ft., Total	$31,920.00
Item VII	$ 489.00 per M Ft., Total	$23,472.00
Item X	$1142.00 per M Ft., Total	$ 2,284.00
Item XIV	$ 185.00 per M Ft., Total	$14,060.00
Item XV	$ 120.00 per M Ft., Total	$12,000.00
Item XVI	$ 92.00 per M Ft., Total	$ 7,360.00

5. That said contract provided that said lead covered cable would be delivered to the defendant, Department of Water and Power of The City of Los Angeles f. o. b. cars, Paterson, New Jersey, under the delivery schedule provided for in said contract as follows:

	Item No.	Beginning Date	
VI	15 reels	July 1, 1946	Completion Date
	10 reels	November 1, 1946	October 31, 1946
	10 reels	February 1, 1947	January 31, 1947
VII, X	⅓	July 1, 1946	October 31, 1946
XIV	⅓	November 1, 1946	January 31, 1947
XV, XVI	⅓	February 1, 1947	March 31, 1947

6. That in any by said contract it was provided that the aforesaid base prices for said cable should be subject to adjustment in the event of changes in labor costs and material costs, or in the [76] event of changes in either labor costs or material costs. For the purpose of such adjustment, plaintiff and defendants agreed that the proportion of the contract price representing labor was twenty per cent (20%) of the contract price, and that the proportion of the contract price representing materials was fifty per cent (50%) of the contract price. During the term of said contract, plaintiff's labor costs substantially increased. Plaintiff and defendants were able to agree upon the amount of the increase

of the contract price with respect to labor under the provisions contained in said contract and said adjustment of the contract price because of the increase in labor costs is not in controversy. The controversy herein relates only to the price adjustment clause dealing with the increased costs of materials used by plaintiff in the manufacture of said cable.

7. Said contract further provided that payment for increase or credit for decrease in the contract price resulting from said price adjustment clause would be deferred until the time for final payment under the terms of the contract. Said contract further provided that the contract price should not be increased by virtue of the price adjustment clause by more than thirty per cent (30%) over the original bid price and that such increased price should not exceed the applicable maximum price established at the date of delivery by the O.P.A. pursuant to the Emergency Price Control Act of 1942. The Court finds that an increase in the contract price to the extent of the amount sued for by the plaintiff in this case will not cause the total increase to exceed thirty per cent (30%) over the original bid price and that such increased price will not exceed the applicable maximum price established at the date of delivery by the O.P.A., pursuant to the Emergency Price Control Act of 1942.

8. The Court finds that prior to the commencement of this action plaintiff duly and regularly filed and presented to the defendants a duly verified claim as required by law, claiming that said defend-

ants, and each of them, were indebted to the plaintiff in the amount herein sued for in addition to the amount of Three Thousand Six Hundred [77] Seventy-one and 56/100 Dollars ($3,671.56) included in said claim, which latter amount was paid by the defendants prior to the commencement of this action. That defendants rejected the portion of plaintiff's claim herein sued on solely on the ground that defendants disagreed with plaintiff's contention with respect to the construction of the price adjustment clause contained in said contract. The Court finds that plaintiff has complied with all of the conditions necessary to entitle plaintiff to bring this action against the said defendants, The City of Los Angeles and the Department of Water and Power of The City of Los Angeles, and that plaintiff has duly performed all the terms and conditions of said contract on its part to be performed. That all of the cable described in said contract has been manufactured and delivered by plaintiff to defendants and that said defendants have accepted said cable.

9. A full, true and correct copy of the price adjustment clause contained in said contract is set out in Paragraph III of defendants' Answer and is as follows:

> "1.3 Price Adjustment Clause: The contract price shall be subject to adjustment for changes in labor and/or material costs, such adjustments to be determined in accordance with the following method, provided however, that the price shall not be increased by virtue

of this adjustment to an amount in excess of the applicable maximum price established at the date of delivery by the OPA pursuant to the Emergency Price Control Act of 1942.

"1. Labor:

"a. For the purpose of adjustment, the proportion of the contract price representing labor is accepted as 20%.

"b. The above amount accepted as representing labor will be adjusted for increases in labor costs, such [78] adjustment to be based on the index of hourly earnings of the 'Electrical Equipment' manufacturing industry, compiled monthly by the U. S. Department of Labor, Bureau of Labor Statistics. The average of the monthly labor index figures for the period from the date of receipt of the Contractor's proposal, April, 1946, (hereinafter referred to as the Base Month) to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly labor index figure with the labor index figure for the Base Month. The adjustment for increases in labor will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing labor, as indicated above, and the result will be accepted as an increase in the contract price.

"c. If the average monthly labor index figure computed as provided in paragraph b above

is less than the labor index figure for October, 1941, the percentage decrease of such average monthly labor index figure from such October, 1941 figure will be computed. The adjustment for decrease in labor will be obtained by applying such percentage of decrease to the amount of the contract price representing labor, as indicated above, and the result will be accepted as a decrease in the contract price.

"2. Material:

"a. For the purpose of adjustment, the proportion of the contract price representing material is accepted as 50%.

"b. The above amount accepted as representing material will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for 'Group VI—Metals and Metal Products' compiled monthly [79] by the U. S. Department of Labor. The average of the monthly material index figures for the period from the Base Month to and including the month specified in the contract for final shipment will be computed and the percentage increase, if any, will be secured by a comparison of such average monthly material index figure with the material index figure for the Base Month. The adjustment for increases in material will be obtained by applying such percentage of increase, if any, to the amount of the contract price representing material, as indicated above, and the result

will be accepted as an increase in the contract price.

"c. If the average monthly material index figure computed as provided in paragraph b, is less than the material index figure for October, 1941, the percentage decrease of such average monthly material index figure from such October, 1941 figure will be computed. The adjustment for decrease in material will be obtained by applying such percentage of decrease to the amount of the contract price representing material, as indicated above, and the result will be accepted as a decrease in the contract price.

"3. General:

"a. The adjustment to which the contract price is subject will be determined as provided for above, except—

"1. If shipment under this contract is extended more than three months from the contract date as a result of causes beyond the reasonable control of the contractor, or because of fire, strike, civil or military authority, etc., the adjustment in contract price for changes in labor and material costs may at the option of the contractor be based on the period from date of receipt of contractor's quotation to the date when complete shipment is made.

"2. If the contract is modified, resulting in a change [80] in contract price or contract date of shipment, the adjustment will be modified accordingly.

"b. In determining the adjustment in con-

tract price, the percentage of increase or decrease in labor and material costs will be calculated to the nearest 1/10th of 1%.

"c. If for any reason the statistics compiled by the U. S. Department of Labor, and referred to above, are not available for use in connection with adjustment in the contract price, adjustment will then be made by means in similar indices. In such event, the selection of substitute indices will be made by mutual agreement of the parties to this contract.

"d. Payment for increase or credit for decrease in the contract price, resulting from the above will be deferred until the time for final payment under the terms of the contract.

"Ceiling for Expenditures: The total price shall not be increased under the foregoing price adjustment clause by more than 30 per cent over the original bid price."

10. That at the time of plaintiff's bid and at the time the said bid was accepted and at the time of the entering into of the said contract there was an extreme shortage of lead and copper and plaintiff did not have on hand at said times or any of them sufficient lead and copper, or either of them, to manufacture said cable. That at said time and for a number of months thereafter the purchase and use of lead and copper by manufacturers was controlled by the United States Government and plaintiff was able to purchase from time to time only sufficient amounts of lead and copper to meet current

manufacturing requirements and deliveries under the contract between the plaintiff and the defendants. That plaintiff using reasonable diligence and subject [81] to Government regulations purchased from time to time the amount of lead and copper required in the manufacture of said cable, but in doing so was reasonably required to pay and did pay for said lead and copper prices in excess of the market price of said lead and copper in the month of April, 1946, and said excess actual cost was substantially more than the amount which plaintiff seeks to recover herein by virtue of said price adjustment clause, and substantially more than the amount herein sought to be recovered added to all payments heretofore made by defendants to plaintiff on account of said price adjustment clause.

That the cost of the lead and copper used in the manufacture of all said items of cable as a group amounted to slightly in excess of ninety per cent (90%) of the total cost of all material used in said cable.

11. That the index of wholesale prices compiled monthly by the United States Department of Labor referred to in the said contract under paragraph 2 Material, subparagraph b of the price adjustment clause, means and was intended to mean the monthly mimeographed publication of the United States Department of Labor, Bureau of Labor Statistics, entitled "Average Wholesale Prices and Index Numbers of Individual Commodities," herein in these Findings also referred to as "Index Numbers of Individual Commodities." That the language

used in said price adjustment clause with respect to said "Index Numbers of Individual Commodities" was intended to and does refer to the index numbers of copper, being commodity No. 472.1 and lead, being commodity No. 473, said copper and lead being two of the group of nonferrous metals which said group of nonferrous metals is a subgroup under Metals and Metal Products in said "Index Numbers of Individual Commodities." That said "Index Numbers of Individual Commodities" does not contain any "Group VI" as quoted in the price adjustment clause herein referred to. That Metals and Metal Products as a group is, however, listed therein as one of the subgroups under "All Commodities." [82] That under said group of Metals and Metal Products in said "Index Numbers of Individual Commodities" there are listed approximately 140 separate commodities, most of which are manufactured commodities of many different types. Said provisions of said price adjustment clause with respect to increases and decreases in material costs were not intended to and do not refer to said Metals and Metal Products as a group or subgroup for the purpose of taking the index numbers of Metals and Metal Products as a group for use in computing any increase or decrease of the contract price, but said reference in said price adjustment clause to Metals and Metal Products was intended solely as a reference to the appropriate place in said "Index Numbers of Individual Commodities" under which the index numbers for copper and lead were to be

found. That copper and lead are the only metals in said cable.

12. That the monthly mimeographed publications of the United States Bureau of Labor Statistics entitled "Average Wholesale Price and Index Numbers of Individual Commodities" (herein also referred to as "Index Numbers of Individual Commodities") for the months of January, February and March of 1947, introduced in evidence as a part of plaintiff's Exhibit 1, are examples of the publications intended to be referred to by the price adjustment clause of said contract as the proper source from which are to be taken the index numbers relating to lead and copper as constituting the material used in said cable.

That Bulletin No. 920, a part of plaintiff's Exhibit 1, contains for each month of 1946 the index numbers of lead and copper as theretofore issued monthly in said "Average Wholesale Prices and Index Numbers of Individual Commodities," and table 12, Page 74 et seq., of said Bulletin No. 920 which lists on Pages 86 and 87, the index numbers of copper Code No. 472.1 and lead Code No. 473 and the same items in the monthly publication "Average Wholesale Prices and Index Numbers of Individual Commodities" for January, February and [83] March, 1947, a part of plaintiff's Exhibit 1, contain the proper index numbers to be used in computing the increases in material costs under the price adjustment clause of said contract.

That the monthly publication entitled "Labor

Review'' introduced in evidence as defendants' Exhibit O is not the monthly publication or an example of the monthly publication referred to or intended to be referred to by the provisions of the price adjustment clause of said contract. The said Labor Review contains only a reprint of portions of said ''Average Wholesale Prices and Index Numbers of Individual Commodities'' and said reprint is not up to date when published.

13. That under the terms and provisions of said price adjustment clause, the parties plainly intended to disregard all non-metallic components contained in said cable. The sole metallic components of said cable are lead and copper and the Court finds that whenever said price adjustment clause in said contract refers to ''material'' or ''increases in material costs'' or ''decreases in material costs'' or similar words or phrases, the word ''material'' or ''materials'' refers to copper, electrolytic, delivered Connecticut Valley, and lead, pig, desilverized, f. o. b. New York, which are the principal component parts of the cable referred to in said contract.

14. The Court further finds that the contract specifications with respect to the quality or type of copper and lead to be used in said cable are identical with the quality or type of copper bearing commodity No. 472.1 (copper, electrolytic, delivered Connecticut Valley), and lead bearing commodity No. 473 (lead, pig, desilverized, f. o. b. New York), two of the nonferrous metals under the general

subgroup of Metals and Metal Products contained in said United States Bureau of Labor Statistics entitled "Average Wholesale Prices and Index Numbers of Individual Commodities."

15. The Court further finds that the percentage of increase of the index numbers relating to copper and lead in said Bureau of [84] Labor "Index Numbers of Individual Commodities" referred to in said contract, computed in accordance with the terms and provisions of said price adjustment clause were for the period from April, 1946 (the Base Month) to and including October, 1946 17.6%; and for the period from April, 1946 (the Base Month) to and including January 31, 1947 33.2%; for the period from April, 1946 (the Base Month) to and including the month of March, 1947 43.2%. That relating said percentage increases to the contract price as provided for in said price adjustment clause, the Court finds that plaintiff is entitled to a price increase in the amount of Nine Thousand Nine Hundred Ninety-six and 69/100 Dollars ($9,996.69), in addition to all amounts heretofore paid by defendants to plaintiff. Accordingly, the Court finds that plaintiff is entitled to recover from the defendants the sum of Nine Thousand Nine Hundred Ninety-six and 69/100 Dollars ($9,996.69), together with interest thereon at the rate of seven per cent (7%) per annum from the 1st day of May, 1947.

16. The Court finds that the construction of the price adjustment clause of said contract contended for by defendants would render said price adjust-

ment clause unfair, unreasonable, inaccurate and speculative; while on the other hand the construction of said price adjustment clause contended for by plaintiff, and herein found by the Court to be the correct construction, renders said clause reasonable, fair and definite and is the only construction which the parties as reasonable business men could have had in contemplation at the time when said contract was entered into.

17. The Court finds that if there are any allegations contained in the Answer of the defendants which are in conflict with the Findings herein made that said allegations are not true or correct.

Upon the foregoing Findings of Fact the Court makes the following: [85]

Conclusions of Law

The Court concludes:

1. In all respects as set forth in the foregoing Findings of Fact.

2. Any conclusion of law that is contained in the foregoing Findings of Fact is hereby expressly incorporated in these Conclusions of Law although not herein expressly referred to.

3. That said price adjustment clause properly construed was intended to refer to and requires a reference to and use of the individual commodity index numbers of copper, Commodity No. 472.1, and lead, Commodity No. 473, in said "Average Wholesale Prices and Index Numbers of Individual Commodities" as published monthly in mimeographic form by the United States Bureau of Labor Statis-

tics at Washington, D. C., from and including April, 1946 to and including March, 1947. That said price adjustment clause does not refer to and was not intended to refer to any index numbers of Metals and Metal Products as a group or subgroup in said publications.

4. That in accordance with the correct construction of said price adjustment clause the plaintiff is entitled to judgment against the defendants in the sum of Nine Thousand Nine Hundred and Ninety-six and 69/100 Dollars ($9,996.69) with interest thereon at the rate of seven per cent (7%) per annum from the 1st day of May, 1947 to the date of judgment herein and that plaintiff is also entitled to recover its costs herein incurred. [86]

Let Judgment be Entered Accordingly.

Dated this 14th day of March, 1949.

/s/ LEON R. YANKWICH,
Judge of the District Court
of the United States.

Presented by and approved:

/s/ HENRY F. PRINCE,
Of Gibson, Dunn & Crutcher,
Attorneys for Plaintiff.

Approved as to form:

.....,
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed March 14, 1949.

In the District Court of the United States in and for the Southern District of California
Central Division

Civil No. 8493-Y

THE OKONITE-CALLENDER CABLE COMPANY, INCORPORATED,

Plaintiff,

vs.

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES, a municipal corporation,

Defendants.

JUDGMENT FOR MONEY DUE UNDER CONTRACT

The above entitled case having duly come on for trial on the 23rd day of February, 1949, at the hour of 10:00 o'clock A.M., before the Honorable Leon R. Yankwich, Judge Presiding, Henry F. Prince, Esq., and Frederic H. Sturdy, Esq., of Gibson, Dunn & Crutcher appearing as counsel for plaintiff, and Russell B. Jarvis, Esq., Assistant City Attorney, and Gerald Luhman, Esq., Deputy City Attorney, appearing as counsel for defendants, and the said respective parties through their counsel having theretofore filed with the Court pre-trial memoranda under local Rule No. 12, and the Court having heard and considered the evidence, both oral and documentary, offered [89] by the respective parties, and the matter having been orally argued

on February 24, 1949, by the attorneys for both parties, and the cause having been submitted to the Court for a decision, and the Court being fully advised in the premises, and having made and filed herein its Findings of Fact and Conclusions of Law, and having directed that judgment be entered in accordance therewith,

Now, Therefore, by reason of the law and findings aforesaid, It Is Hereby Ordered, Adjudged and Decreed that plaintiff have and recover from the defendants the sum of Nine Thousand Nine Hundred Ninety-six and 69/100 Dollars ($9,996.69), together with interest thereon at the rate of seven per cent (7%) per annum from the 1st day of May, 1947 to the date hereof, in the amount of $1,306.21, and that plaintiff also have judgment against the defendants, and each of them, for its costs herein taxed in the sum of $39.98.

Dated this 14th day of March, 1949.

/s/ LEON R. YANKWICH,
Judge of the District Court
of the United States.

Presented and approved:

By /s/ HENRY F. PRINCE,
Of Gibson, Dunn & Crutcher,
Attorneys for Plaintiff.

Approved as to form:

....,
Attorneys for Defendants.

[Title of District Court and Cause.]

PLAINTIFF'S COMPUTATION OF INTEREST ON THE AMOUNT OF JUDGMENT PURSUANT TO LOCAL RULE NO. 7.

Plaintiff and defendants are in agreement that as a matter of computation interest at the rate of seven per cent (7%) per annum should run from the 1st day of May, 1947 (rather than from the 1st day of March, 1947, as prayed for in the Complaint) on the principal amount of the judgment for Nine Thousand Nine Hundred and Ninety-six and 69/100 Dollars ($9,996.69) found to be due from the defendants to the plaintiff.

Plaintiff's computation of said interest from said 1st day of May, 1947 up to the 14th day of March, 1949 (estimated by plaintiff to be the date when the judgment will be signed by the Court) is One Thousand Three Hundred Six and 21/100 Dollars ($1,306.21). [91]

The daily rate of interest on said principal sum is One and 91/100 Dollars ($1.91) so that in the event said judgment is not signed on the 14th day of March, 1949 additional interest in the amount of One and 91/100 Dollars ($1.91) per day should be added to said amount of One Thousand Three Hundred Six and 21/100 Dollars ($1,306.21).

Dated this 7th day of March, 1949.

STEPHEN A. WILSON,
GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY,
By /s/ HENRY F. PRINCE,
Attorneys for Plaintiff.

Received copy of the foregoing Plaintiff's Computation of Interest this 7th day of March, 1949, at two o'clock P.M.

RAY L. CHESEBRO,
City Attorney.
By GERALD LUHMAN,
Deputy,
Attorneys for Defendants.

Judgment entered Mar. 15, 1949.

Docketed Mar. 15, 1949.

Book 56, page 634.

EDMUND L. SMITH,
Clerk.
By C. A. SIMMONS,
Deputy.

(Receipt of Copy acknowledged.)

[Endorsed]: Filed March 14, 1949. [92]

At a stated term, to wit: The February Term, A. D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the second day of May in the year of our Lord one thousand nine hundred and forty-nine.

Present: The Honorable: Leon R. Yankwich,
District Judge

[Title of Cause.]

For hearing motions filed March 25, 1949, (1) for new trial, (2) to set aside findings and conclusions, and (3) to vacate and set aside judgment; H. F. Prince and F. H. Sturdy, Esqs, appearing as counsel for plaintiff; R. B. Jarvis, Asst. City Att'y, and Gerald Luhman, Deputy City Att'y, appearing as counsel for defendant City of Los Angeles;

Attorney Jarvis argues to the Court. Deft's Ex. A, B, C, and D on hearing are marked, and admitted in evidence for illustration only, said exhibits being charts.

Attorney Prince argues to the Court. Court orders motions 1, 2, and 3 each denied. [126]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that The City of Los Angeles, a municipal corporation, and Department of Water and Power of the City of Los Angeles, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on March 15, 1949.

Dated: Los Angeles, California, May 27, 1949.

/s/ RAY L. CHESEBRO,
City Attorney.
By GILMORE TILLMAN,
Chief Assistant City Attorney
for Water and Power.
By RUSSELL B. JARVIS,
Assistant City Attorney.
Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed May 27, 1949. [130]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL BY DEFENDANTS AND APPELLANTS

To the Clerk of the Above-Named Court:

The Department of Water and Power of the City of Los Angeles and the City of Los Angeles, a municipal corporation, defendants and appellants herein, do hereby designate to be contained in the record on appeal in the above-entitled action the complete record and all the proceedings in the above-entitled action, including "Plaintiff's Pre-Trial Points and Authorities Pursuant to Local Rule 12" and "Defendants' Memorandum Prior to Trial," and all the evidence and proceedings at the trial of the above-entitled action, which was tried

on February 23, 1949, and February 24, 1949, in question and answer form, and all exhibits introduced and received in evidence [131] herein, and also including the decision of the Court filed herein February 28, 1949, excepting and excluding from the foregoing designation only the following:

1. "Defendants' Objections to Plaintiff's Proposed Findings of Fact and Conclusions of Law."

Dated: June 14, 1949, Los Angeles, California.

/s/ RAY L. CHESEBRO,
City Attorney.
By GILMORE TILLMAN,
Chief Assistant City Attorney
for Water and Power.
By RUSSELL B. JARVIS,
Assistant City Attorney.
Attorneys for Defendants
and Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed June 14, 1949. [132]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL BY PLAINTIFF AND APPELLEE

To the Clerk of the Above-Named Court:

Defendants and Appellants, Department of Water and Power of the City of Los Angeles and

The City of Los Angeles, a municipal corporation, filed on June 14, 1949, a Designation of the Contents of Record in which they designated the portions of the record they desired to be included on appeal in the above entitled action. It is believed that this designation covers all of the record necessary, but in order that the Clerk may be more fully informed as to exactly what papers and documents the plaintiff and appellee, The Okonite-Callender Cable [134] Company, Incorporated, specifically desires, it does hereby designate to be contained in the record on appeal in the above entitled action, the following papers:

1. The material pleadings on file herein.

2. Plaintiff's pre-trial points and authorities pursuant to Local Rule 12.

3. Defendants' memorandum prior to trial.

4. The Findings of Fact and Conclusions of Law.

5. The decision and opinion of the District Judge, dated February 28, 1949.

6. The Judgment herein appealed from dated March 14, 1949.

7. Notice of Appeal by defendants and appellants herein dated May 27, 1949.

8. The reporter's transcript of all the evidence and proceedings at the trial of the above entitled action which was tried on February 23, 1949 and February 24, 1949, in question and answer form.

9. Plaintiff's exhibits 1 to 3 inclusive, and defendants' exhibits A to O inclusive, all of which were introduced and received in evidence herein.

Dated at Los Angeles, California, this 21st day of June, 1949.

STEPHEN A. WILSON
GIBSON, DUNN & CRUTCHER
HENRY F. PRINCE
FREDERIC H. STURDY
By HENRY F. PRINCE,
Attorneys for Plaintiff and Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1949. [135]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL

It Appearing that an appeal has been taken by the defendants and appellants, Department Of Water And Power Of The City Of Los Angeles and The City Of Los Angeles, a municipal corporation, from the judgment entered herein by filing their Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on May 27, 1949, and that the plaintiff and appellee and said defendants and appellants have served and filed their respective designation of the portions of the record, proceedings and evidence to be contained in the record on appeal herein, and that additional time is required in making up the record on appeal, as requested by defendants and appellants; [137]

It Is Ordered that the time for filing the record on the appeal of defendants and appellants, Department Of Water And Power Of The City Of Los Angeles and The City Of Los Angeles, a municipal corporation, herein and for docketing the appeal taken herein by said defendants and appellants is extended from the 6th day of July, 1949, to and including the 6th day of August, 1949.

Dated this 24th day of June, 1949.

/s/ LEON R. YANKWICH,
Judge of the District Court
of the United States.

Receipt of copy acknowledged.

[Endorsed]: Filed June 24, 1949. [138]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE APPEAL

It Appearing that an appeal has been taken by the defendants and appellants, Department Of Water And Power Of The City Of Los Angeles and The City Of Los Angeles, a municipal corporation, from the judgment entered herein by filing their Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on May 27, 1949, and that the plaintiff and appellee and said defendants and appellants have served and filed their respective designation of the portions of the record, proceedings and evidence to be contained in the

record on appeal herein, and that additional time is required in making up the record on appeal, as requested by defendants and appellants; [139]

It Is Ordered that the time for filing the record on the appeal of defendants and appellants, Department Of Water And Power Of The City Of Los Angeles and The City Of Los Angeles, a municipal corporation, herein and for docketing the appeal taken herein by said defendants and appellants is extended from the 6th day of August, 1949, to and including the 25th day of August, 1949.

Dated this 3rd day of August, 1949.

/s/ LEON R. YANKWICH,
Judge of the District Court
of the United States.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 3, 1949. [140]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 140, inclusive, contain the Complaint for Money Due on Contract; Answer; Plaintiff's Pre-Trial Points and Authorities Pursuant to Local Rule 12; Defendants Memorandum Prior to Trial; Decision of the Court; Findings of Fact and Conclusions of Law; Judgment for Money Due Under Contract; Defendants Motions for a

New Trial, Setting Aside and Amending Findings of Fact and Conclusions of Law and Altering and Amending and Vacating and Setting Aside Judgment, Points and Authorities in Support Thereof; Memorandum of Plaintiffs Points and Authorities in Opposition to Defendants Motions for a New Trial, etc.; Stipulation for Stay of Execution and Order Thereon; Notice of Appeal; Designation of Contents of Record on Appeal by Defendants-Appellants; Designation of Contents of Record on Appeal by Plaintiff-Appellee; Order Extending Time for Filing the Record on Appeal and Docketing the Appeal filed June 24, 1949; Order Extending Time for Filing the Record on Appeal and Docketing the Appeal, filed August 3, 1949; and full, true and correct copy of Minute Order Entered May 2, 1949, which together with copy of reporter's transcripts of proceedings on February 23, 1949 and February 24, 1949, and original Plaintiff's Exhibits 1, 2 and 3 and the original Defendants Exhibits A through O inclusive, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, which sum has been paid by the appellant.

Witness my hand and the seal of said District Court this 24th of August, A.D., 1949.

[Seal] EDMUND L. SMITH,
Clerk.
By /s/ EDWARD T. DREW,
Deputy.

In the District Court of the United States, in and For the Southern District of California, Central Division

No. 8493-Y Civil

THE OKONITE-CALLENDER CABLE COMPANY, INCORPORATED,

Plaintiff,

vs.

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES, a Municipal Corporation,

Defendants.

Honorable Leon R. Yankwich, Judge presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California
February 23, 1949

Appearances:

For the Plaintiff:

STEPHEN A. WILSON, Esq.
GIBSON, DUNN & CRUTCHER
HENRY F. PRINCE, Esq.
FREDERIC H. STURDY, Esq.
634 South Spring Street
Los Angeles 14, California; by
HENRY F. PRINCE, Esq.

For the Defendants:
City Attorney
GILMORE TILLMAN
Chief Assistant City Attorney for Water and Power
RUSSELL B. JARVIS
Assistant City Attorney
GERALD LUHMAN
Deputy City Attorney
207 South Broadway,
Los Angeles, California; by
RUSSELL B. JARVIS, Esq. [2*]

Los Angeles, California; February 23, 1949, 10:00 o'Clock A.M.

ALBERT F. METZ

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Albert F. Metz.

Direct Examination

By Mr. Prince:

Q. Mr. Metz, what position did you hold with the plaintiff the Okonite-Callender Cable Company, Inc., in April 1946?

A. Vice president and treasurer.

Q. What position do you hold with them now?

* **Page numbering appearing at top of page of original Reporter's Transcript.**

(Testimony of Albert F. Metz.)

A. The same position, vice president and treasurer.

Q. How long have you been connected with that Company?

A. Since its inception in 1924.

Q. Have you had occasion to make a calculation of the lead and copper compared with other material involved in the contract? A. Yes.

Mr. Jarvis: May I ask that the answer go out?

Mr. Prince: My question is based upon the cost of new material.

Mr. Jarvis: We object upon the ground the question is [4] immaterial.

The Court: It is merely preliminary.

Mr. Jarvis: We think it is irrelevant and immaterial. The contract speaks for itself. It is not necessary to resort to extrinsic evidence to determine the meaning.

The Court: Overruled.

(Question read by the reporter.)

A. That is correct.

Q. (By Mr. Prince): That is, the cost of them?

A. Yes.

Q. What was the result, Mr. Metz?

Mr. Jarvis: I object to this question upon the same ground previously stated. Also upon the ground that the cost is indefinite as to the cost to whom, and based upon what cost.

The Court: I think you had better lay a better foundation.

(Testimony of Albert F. Metz.)

Q. (By Mr. Prince): As to the April cost price of copper and lead and other material in the cable, can you state what the costs were of copper and lead and whatever insulating material was in the cable as of that date—is the question of the purchase of material and cost and computation of the amount of lead and wire under your general jurisdiction? A. Yes.

Q. It has been for many years? [5]

A. Yes.

Q. As a matter of fact, you know or your own knowledge what the cost of the different material is? A. That is correct.

Mr. Prince: I will stipulate that the same objection may be made to all of this testimony.

Mr. Jarvis: I would like to renew my objection.

The Court: The objection is overruled.

A. The cost of copper and lead was 90 per cent of the cost of all material used in the cable.

Q. (By Mr. Prince): When this contract was entered into in May, did your company have on hand a sufficient quantity of copper and lead to cover this contract? A. No.

Mr. Jarvis: We ask that the answer go out. We have the same objection, that it is irrelevant and immaterial.

The Court: I will hear the evidence on the subject. I think the factual basis is very limited.

Q. (By Mr. Prince): The question is, did you have sufficient copper and lead on hand to meet the

(Testimony of Albert F. Metz.)

requirements of this contract as of the time the bids were put in, or the time the contract was entered into, in May 1946? A. No.

Q. How were you able to acquire the copper and lead necessary for the contract?

Mr. Jarvis: Same objection.

The Court: Overruled. [6]

A. Copper and lead at that time were controlled by the government, and you were only permitted to have what copper and lead you could use for your production in the following month.

Q. The result was that you had to purchase from time to time your copper and lead requirements?

A. That is correct.

Q. Can you say the approximate amount for copper and lead that you had to pay over and above the April and May quotations for copper and lead?

Mr. Jarvis: I would say that may be out of order, your Honor. In the orderly procedure we should have the contract in evidence and introduced for the court to determine whether it is material for the court to hear this type of evidence.

(Discussion.)

The Court: Overruled.

Q. (By Mr. Prince): What was the actual cost of the copper and lead over the April prices?

A. The increase in the cost of copper and lead material was about $24,000.

Q. The contract specifies the type of lead and copper in the cable? A. Yes.

(Testimony of Albert F. Metz.)

Q. In the specifications copper is given at 472.1 and lead as 473, in the Bureau of Labor Statistics figures? [7] A. Yes.

Mr. Jarvis: This appears to be only for the Department of Labor specifications, rather than the Water and Power specifications.

Mr. Prince: No, I want to know whether the specifications in that contract would be complied with in the way of furnishing copper and lead under the price quoted under the Bureau of Labor specifications.

Mr. Jarvis: That is arguing the matter. This is the specific contract involved here which would be determinative of what type of cable was required to be furnished. Is that correct?

A. Yes.

Mr. Prince: That is all.

The Court: Cross-examine.

Mr. Jarvis: Upon the grounds which we have specified in our objections we move to strike all the testimony of Mr. Metz on direct examination.

The Court: Motion denied.

Cross-Examination

By Mr. Jarvis:

Q. Do you have any figures with you, Mr. Metz, as to the computation which you made to price?

A. No, I have no figures with me as to the calculation of the cost of the copper that was used.

Q. It is a fact that as to the proportionate quantity of lead and copper in the manufacture of the

(Testimony of Albert F. Metz.)

six types of cable involved here, it will vary as to each type of cable?

A. Yes. That is, the lead and copper?

Q. The lead and copper.

A. That is correct.

Q. It is not constant as to each type of cable?

A. No.

Q. That is true as to the price?

A. The price would be the same; relative quantities would be different.

Q. I should have qualified it as to each type of cable. A. Yes.

Q. It would vary as to each particular commodity, whether copper or lead, because of that?

A. The price would vary, that is correct.

Q. That is also true as to the lead and copper, in volume? A. Yes, it would vary.

Q. In each cable? A. Yes.

Q. It would also vary as to the weight of lead and copper? A. Yes. [9]

Q. And that would hold true during the entire period of the contract, as the price is changed from time to time during the period of this contract, which is April, 1946, through March, 1947—the price varied from time to time of copper and lead?

A. That is correct.

Q. So that the cost of copper and lead as to the six particular types of cable would vary as the change took place?

A. Each would change relatively as to the increase in price of copper and lead.

(Testimony of Albert F. Metz.)

Q. The weight would remain the same?

A. Yes.

Q. As a matter of fact, that was the total cost of copper and lead for the cable to be furnished under item VI? Are you familiar with that type of cable?

A. As I hear it mentioned. I don't remember the sequence of the items.

Mr. Jarvis: I have a copy of the contract.

Mr. Prince: I left with the court, with my memorandum, a copy of the contract which was made up for me. I don't have an official copy of it.

Mr. Jarvis: If agreeable, it may be offered in evidence at this time?

Mr. Prince: Certainly. [10]

Mr. Jarvis: Subject to any corrections shown to be necessary.

The Court: It may be received.

The Clerk: Defendant's Exhibit A in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit A.)

Q. (By Mr. Jarvis): Referring to the contract, Mr. Metz, and the type of cable to be furnished under item VI—have you that in mind?

A. Yes, I see where it is.

Q. Isn't it a fact that the total cost of material there would be less than 50 per cent of the total cost of cable as of April, 1946?

A. I could not tell very well. That is quite a computation. I could not do it in my head. I can

(Testimony of Albert F. Metz.)

probably give you some idea if I see some figures I have in my papers.

Q. If you wish to refer to them.

A. The cost of copper and lead alone on that item would be very close to 50 per cent.

Q. Probably about 42 per cent? Would that be about right?

A. I have to go back for the total price, $31,900. The total price of copper and lead, $13,800.

Q. You are using April, 1946?

A. That's right. The April prices, roughly 43 per [11] cent for copper and lead.

Q. How much for paper and oil?

A. I don't happen to have the figures to calculate that with. I should judge it would be vary close to 7 per cent; the difference between 43 and 50 per cent.

Q. Can you give us the same figures on item VII of the contract?

A. That is about $9000 worth of copper and lead against $23,400 total for the billing price.

Q. We are agreed on that item, that 29.2 per cent for the total cost of 100 feet of cable would be on account of lead.

Mr. Prince: You are now relating this cost of lead and copper to the contract price?

Mr. Jarvis: Yes, and for the material distribution based on cost of the cable.

Mr. Prince: The cost of copper and lead did not relate to the contract price. I understand you are now relating——

(Testimony of Albert F. Metz.)

Mr. Jarvis: To both, the relative percentage of labor and cost of material, and contract price.

Mr. Prince: I have no objection.

A. That figures out about 38 per cent for the cost of copper and lead.

Q. (By Mr. Jarvis): What percentage for copper and what percentage for lead? [12]

A. I did not go that far.

Q. Would you get 29.2 per cent for lead and 6 per cent for copper?

A. I would have to work it out. About 32 per cent for lead and about 6 per cent for copper.

Q. About 7½ per cent for paper and oil?

A. That could vary. I am really not in a position to give anything on paper and oil. I have no figures.

Mr. Prince: I will accept what figures you have with respect to the matter, unless you want to do it on cross-examination.

The Witness: I do have something on the total.

Mr. Jarvis: I do want to talk about the particular items, and I do have some figures which have been prepared.

Mr. Prince: If I understand, you are basing the cost of lead and copper on what the City paid for the cable. Our question was regarding material, labor, overhead, and everything else—what was the cost of lead compared with other material?

Mr. Jarvis: This will show.

Mr. Prince: I have no objection.

(Testimony of Albert F. Metz.)

The Court: Overruled.

Mr. Jarvis: I would like to ask Mr. Prince if he would check this to his satisfaction. There is a lot of computation back of this. For the sake of saving time, I might offer [13] this in evidence.

Mr. Prince: That will be perfectly satisfactory. It will take a little time, and it may go in subject to correction.

The Court: That may be received as Defendant's Exhibit——

The Clerk: Exhibit B in evidence.

The Court: And may be marked in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit B.)

Mr. Jarvis: This is also shown in the form of a chart that has been prepared, and we would like to offer that in the same manner, subject to correction.

The Court: It may be received.

The Clerk: That is Defendant's Exhibit C in evidence.

(The chart referred to was received in evidence and marked Defendant's Exhibit C.)

Mr. Jarvis: As to the varying sizes of cable, Mr. Metz, showing the weight of the cable, the lead sheath, and the insulation and strands—are you familiar with this chart, showing items VI and VII thereof? That figure III on the diagram illustrates the type of cable in both items VI and VII.

(Testimony of Albert F. Metz.)

A. The only information I have generally available here is to check the size of the conductor. [14]

Mr. Jarvis: If agreeable to counsel, we will make the same offer.

Mr. Prince: I have no objection.

Mr. Jarvis: This illustrates the type of cable. We will offer the two as one exhibit, as determining the relative proportion of copper and lead and other material in making up the six types shown in the contract.

Mr. Prince: No objection.

The Court: Admitted.

The Clerk: Defendant's Exhibit D in evidence.

(The chart referred to was received in evidence and marked Defendant's Exhibit D.)

Mr. Jarvis: Corresponding with the last exhibit, we do have samples of the cable, furnished by the defendant to the plaintiff. Two of these are samples of the cable furnished, and the others are similar types of cable. I think counsel has seen these.

Mr. Prince: I have seen those.

Mr. Jarvis: They were actually manufactured under the same specifications as now before the court, but by a different manufacturer. I offer them as next in order.

The Clerk: Are these received?

The Court: Yes.

The Clerk: Defendant's E in evidence. [15]

(The cable referred to was received in evidence and marked Defendant's Exhibit E.)

(Testimony of Albert F. Metz.)

Mr. Jarvis: No. 1 is a sample of the cable furnished by plaintiff of item VII under this contract.

The Witness: I think this would be 2/0; that would be 2/0.

Mr. Prince: I don't think it makes any particular difference. They are a sample of the six types before the court.

The Court: All right.

Mr. Jarvis: The one which is received as the sample of the cable No. VI should be No. VII, and the sample furnished by the plaintiff under the item No. VI is the one which we now offer.

The Witness: That is correct.

The Court: It may be received.

The Clerk: Defendant's Exhibit F in evidence.

(The cable referred to was received and marked Defendant's Exhibit F in evidence.)

Mr. Jarvis: And as the sample of the cable furnished under item No. X, under the same specification, but I believe manufactured by another company——

The Witness: That looks like the right size.

The Court: It may be received.

The Clerk: Defendant's Exhibit G in evidence.

(The cable referred to was received in evidence and marked Defendant's Exhibit G.)

Q. (By Mr. Jarvis): I show you this, Mr. Metz, and ask you if that appears to be item XIV.

A. I would say so, to the naked eye.

(Testimony of Albert F. Metz.)

Mr. Jarvis: I offer this in evidence, your Honor, as next in number.

The Clerk: Defendant's Exhibit H in evidence.

(The cable referred to was received in evidence and marked Defendant's Exhibit H.)

The Court: What is that solid matter in the center?

A. That is paper and insulation.

Q. (By Mr. Jarvis): I will ask you if this appears to be a sample of the cable furnished under item XV? A. It appears to be.

The Court: It may be received.

The Clerk: Defendant's Exhibit I in evidence.

(The cable referred to was received in evidence and marked Defendant's Exhibit I.)

Mr. Jarvis: I will ask if this appears to be a sample of the cable furnished under item XVI.

A. That appears to be.

Mr. Jarvis: I offer this next in order.

The Clerk: Defendant's Exhibit J in evidence.

(The cable referred to was received in evidence and marked Defendant's Exhibit J.)

Q. (By Mr. Jarvis): In all of these exhibits, the copper shows up as copper-colored, and the lead shows up as black, and the composition of the other materials——

A. It is paper on both, manila and pulp; the paper is impregnated with oil. The paper is used as a means for holding the oil. That is wrapped

(Testimony of Albert F. Metz.)

around the copper, and that builds a wall, to take care of the voltage in the specification.

Q. In the Department, Bureau of Labor Statistics, index of wholesale prices, metals and metal products, there is no commodity such as oil or paper.

A. I don't recall either of those items.

Q. So, as a matter of fact, when you state that 90 per cent of the cost of materials in the making of these cables is on account of lead and copper, that is subject to qualification as to which cable?

A. I was thinking of the combination.

Q. But as to each type of cable that varies?

A. Yes.

Q. From whom did you purchase the lead and copper that went into the cable?

A. I couldn't say which particular source this came from. It goes into our stock, and goes out.

Q. Was copper and lead on hand?

A. No, not for the cable.

Q. But you had stock on hand?

A. We were not allowed to have stock on hand.

Q. You had some on hand?

A. For production, according to schedule.

Q. During what month did you acquire lead and copper used in the manufacture of the cable?

A. It was acquired during the life of the delivery.

Q. Can you give us the delivery date?

A. Approximately October, 1946, and March, 1947.

(Testimony of Albert F. Metz.)

Q. You did not acquire any copper used in the manufacture of cable during October, 1946?

A. Yes, indeed. I should not have said during the period of shipment; I should have said manufacture.

Q. This $24,000 figure is your estimate of the increased cost of both copper and lead during the period of manufacture, the contract period over and above what it was in April, 1946?

A. That is correct.

Q. In computing the matter of increase in labor cost, Mr. Metz, did you have a copy with you of the United States Department of Labor Index for that purpose?

A. I have only the 1946 summary.

Q. Does that show the table for—— [19]

A. I have only got my own memorandum about what that index was for the months of April and March.

Q. That is shown in the claim filed?

A. Yes.

Mr. Prince: There is not any controversy, if you want to show that.

Mr. Jarvis: I am showing you now a copy of the claim which you filed.

A. That is correct.

Q. In one of the schedules it shows the index which you use in computing the labor cost?

A. Yes.

Q. That is, in column 2 it shows the labor index?

(Testimony of Albert F. Metz.)

A. Yes.

Mr. Jarvis: We offer that next in evidence.

Mr. Prince: No objection.

The Clerk: Is it admitted, your Honor?

The Court: Yes.

The Clerk: Defendant's Exhibit K in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit K.)

Q. (By Mr. Jarvis): Are you familiar with the mimeographed releases of the United States Department of Labor, hourly earnings for the month of April, 1946? A. Yes. [20]

Q. Table 2? A. Yes.

Q. You are familiar with the contract for the hourly wage, in the specification in the index for electrical equipment? A. Yes.

Q. What was it for the month of April?

A. 24.9—April, 1946, was 110.4.

Q. That was the figure that was used?

A. I imagine that it must be.

Q. It refers to schedule 2 of the claim?

A. Yes, that's right.

Mr. Jarvis: We offer this in evidence as defendant's next in order.

Mr. Prince: That, of course, if your Honor please, appears to be the table without dispute that was referred to the labor adjustment. I don't see the materiality. I don't want to object. I think it is adding to the record. We are both in agreement as to the labor increase.

(Testimony of Albert F. Metz.)

The Court: The objection will be overruled.

The Clerk: Defendant's Exhibit L in evidence.

(The document referred to was received in evidence and marked Defendant's Exhibit L.)

Mr. Jarvis: There are seven of these, beginning the month of April through the month of May, 1947. [21]

The Court: Why don't you offer it as a sample? You are making a very voluminous record. You need only one to illustrate it.

Mr. Jarvis: That is quite agreeable if counsel would agree that the others would show the figure on the labor index on Defendant's Exhibit K, Schedule 2.

Mr. Prince: That is satisfactory.

Mr. Jarvis: If the court please, that concludes our cross-examination of Mr. Metz except on one point, on which we would like to have the privilge of recalling him.

The Court: And redirect?

Mr. Prince: No redirect examination.

The Court: Step down.

Mr. Prince: If the court please, I think the only other thing I want to put in evidence is out of Mr. Jarvis' files. I have seen it before. It is simply a certified copy from the Bureau of Labor, of the price index—the three monthly reports. I think they might be offered in evidence as one exhibit.

Mr. Jarvis: The materiality of some of these

(Testimony of Albert F. Metz.)

we make objection to. We object to the introduction of all those proposed, and certified by the Department of Labor, with the exception of the Table, on pages 11 and 12 of Bulletin 920, Department of Labor, and with the exception of three monthly releases, January, February and March, 1947—the last [22] page of each release. Those matters, we feel, are material to this case.

The Court: Objection overruled.

The Clerk: Plaintiff's Exhibit No. 1 in evidence.

The Court: They are not objecting to the lack of foundation. They are objecting to materiality. I am allowing all this material to go in, and I will determine later on as to effect to give it.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Prince: Nothing further on the part of the plaintiff.

(Whereupon an adjournament was taken until 2:00 o'clock p.m. of the same date.) [23]

Los Angeles, California;
February 23, 1949; 2:00 o'Clock P.M.

Mr. Jarvis: If the court please, plaintiffs have during the noon recess gone over defendant's Exhibit No. B, and have pointed out to us where Table IV, on page 2, refers to the monthly review, and we would ask leave to strike the words

"monthly labor review," and the statement would then read "Bureau of Labor Statistics for April of 1946," if that is agreeable.

Mr. Prince: That is agreeable, your Honor.

ALBERT F. METZ

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Cross-Examination

By Mr. Jarvis:

Q. Mr. Metz, if you can, state briefly to the court the result of your checking the exhibit as to quantities of lead and copper in the manufacture of cable by type, value, weight, and so forth.

A. On Exhibit B, I would like to call your attention to Tables I, II, III and IV, and I would like to say something about the weights used. In the manufacture of cable, where we have to make cable, rather rigid allowances have to be made for tolerance, in order to come out with your cable acceptable to the inspector.

Q. In the manufacture you want to be sure that you meet the requirements? A. Yes.

Q. These tables were prepared from particular weights which would not correspond exactly with the manufactured cable?

A. Yes. That is the contract price, and this is the cost of lead and oil. On Table IV it would be well to state that the total is 50 per cent of the contract price.

(Testimony of Albert F. Metz.)

Q. It is agreeable to us if you will mark the exhibit.

A. I think it will be well to state that.

Mr. Jarvis: The witness is writing with pencil the words "contract price," and on Table IV the witness is writing "50 per cent of contract price."

A. Yes. There are three sheets to this Exhibit B. According to our estimate, the total figure was $108,130.

Q. There, too, the weights which you actually used were over the amounts stated in the table as theoretical weights? A. That is correct.

Q. Your total of copper and lead used in connection with this cable was how much?

A. $40,310.81.

Q. The cost, then—Did I understand you, the plaintiff [25] entered into the contract dated April 1946, and the cost of the copper and lead, based upon the amount actually used, in that connection was about $16,000? In other words, $24,000——

A. $24,000, in addition to the $40,310.81. These figures were the figures we estimated for the April cost; according to our figures, $38,078.

Q. The only difference in your table was using theoretical weight? A. Yes.

Q. As against the actual amount of copper and lead? A. That is correct.

Q. Is there any comment you wish to make?

A. In Exhibit C, I ought to make a check as to the weights. We would say the same remarks here

(Testimony of Albert F. Metz.)

as to the weights. In Exhibit C, a graph of costs, would indicate what I said before this morning, that about 90 per cent of the cost of material is in copper and lead.

Q. With regard to the cable in item VI, this shows 51 or 52 per cent——

A. Of the total contract price.

Q. Of the total contract price for that item was made up of other costs than material?

A. Yes.

Q. About 52 per cent of the total contract price was [26] made up of costs other than of material?

A. That's right.

Q. As to item X, about 20 per cent was made up of costs other than materials?

A. That is right.

Q. The other item—XIV?

A. About 48 per cent of other costs.

Q. Item XV, about half of 50 per cent was made up in other costs? A. Yes.

Q. As to item XVI, about 57 per cent was made up of other costs? A. Yes.

Q. Do you have any other comments as to the exhibits and bulletin, showing the costs?

A. I have no other comment.

Q. With those comments, the table, the calculations, the chart, are accepted as being accurate?

A. They seem to be. On examination of Exhibit D, I just noticed the drawings were approved by Mr. Bolser and Mr. Jenkins, and any drawings by them are good enough for us.

(Testimony of Albert F. Metz.)

Q. Mr. Bolser and Mr. Jenkins are electrical engineers in charge of underground installation?

A. Yes, and very capable men. [27]

Q. I show you what appear to be invoices of The Okonite-Callender Cable Co., dated December 23, 1946, December 31, 1946, February 11, 1947—two of them—and April 16, 1947, and ask you if you are familiar with those. A. Yes.

Q. You recognize those as being invoices of your company? A. Yes.

Q. Those were sent to the Department of Water and Power by your company? A. Yes.

Q. And the invoices were paid by the Department of Water and Power to your company?

A. Yes.

Mr. Jarvis: We offer those in evidence as defendant's exhibit next in order.

Mr. Prince: I want to make the same abjection. I want to object to the introduction on two different and independent grounds: 1, that the defendant has taken the position that the contracts are clear and unambiguous. There are cases in the Federal courts where the contracts are clear and unambiguous, holding such evidence not admissible; on the second ground, that they are not admissable under both the Federal and Ninth Circuit cases, unless the authority of the person sending them has been proved. They are not admissable or at least subject to a motion to strike if not connected.

(Argument.)

(Testimony of Albert F. Metz.)

The Court: The objection will be overruled. It may be received as an exhibit.

The Clerk: That is Defendant's Exhibit M.

(The document referred to was received in evidence and marked Defendant's Exhibit M.)

Mr. Jarvis: As this is an original record of the Department, we have photostatic copies which we would like to offer in lieu of the originals and withdraw the originals.

The Court: The objections are overruled, and copies of the originals may be filed.

Q. (By Mr. Jarvis): In other words, these invoices were sent out by your company in the usual course of business? A. Yes.

Q. And were paid by the Department in the same manner? A. Yes.

Q. That is all.

Cross-Examination

By Mr. Prince:

Q. When did you first see or hear of these invoices you have just identified? A. April 1947.

Q. That was after the contract had been fully performed? [29]

A. That was after all the shipments had been made.

Q. What did you do after you learned of these particular invoices? Did you prepare or have prepared a formal invoice that covered the whole contract. That is correct.

Q. I show you an invoice dated September 29,

(Testimony of Albert F. Metz.)

1947, No. CO247, and ask you if that was prepared by you, or under your supervision, after you learned of the other invoices that have just been introduced in evidence. A. That is correct.

Q. And it indicates the supporting data of the amount we are claiming under the adjustment clause? A. Yes.

Q. When the contract was entered into, were you then familiar with the fact that it contained a provision as to an escalator clause?

Mr. Jarvis: I object to that. It is immaterial.

Mr. Prince: Withdrawn. Were you familiar that the contract provided that the time for adjustments in the contract would be deferred until completion of the contract?

Mr. Jarvis: Is this directed to Mr. Metz' knowledge individually?

Mr. Prince: It is not for the purpose of varying the terms at all. The question of adjusting the price was under Mr. Metz' jurisdiction as vice president and treasurer [30] of the company.

The Court: Go ahead.

A. Yes, I knew there was an escalation to be carried over at the end of the contract.

Q. And you had not personally known anything about the fact that this interim invoice had been given until after the completion of the contract?

A. That is correct.

Q. After that a claim was prepared and presented to the City and paid in part and rejected in part? A. That is correct.

(Testimony of Albert F. Metz.)

Mr. Prince: I think that is all.

Redirect Examination

By Mr. Jarvis:

Q. Prior to April or May 1947, you did not have any conversations with any representative of the Department of Water and Power, one of the defendants here, as to the method of billing?

A. No, I had no conversation.

Q. I believe you did, when Mr. Wilson and you came to my office? A. Yes.

Q. The exact date I don't recall. I believe it was June 1947.

A. Yes, when this was brought to my attention for [31] final billing we saw what had been done, and we arranged to meet with you and Mr. Foster.

Q. Prior to that you had no conversation?

A. No.

Q. That is all.

Recross Examination

By Mr. Prince:

Q. Mr. Metz, Mr. Jones, who signed the final contract with Mr. Wilson, died sometime in January? A. Yes.

Q. You were vice president and treasurer and the chief executive officer of the company?

A. I am today.

Q. The presidency has not been fileed to date?

A. No.

The Clerk: Is this admitted?

The Court: Yes.

(Testimony of Albert F. Metz.)

The Clerk: Plaintiff's Exhibit 2 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Jarvis: We have three motions to strike directed to particular portions of Mr. Metz' testimony.

The first is, the defendants move to strike the part that 90 per cent of the value of the material going into the manufacture of this cable is made up of lead and copper. [32]

The second motion——

The Court: Let us have one at a time.

Mr. Jarvis: ——on the ground that the evidence is incompetent, irrelevant and immaterial.

The Court: The motion will be denied.

Mr. Jarvis: And the second motion to strike the testimony of Mr. Metz is that the material which they actually used in the manufacture of this cable under this contract actually cost more than $24,000 than it cost at the time they entered into the contract. In other words, during the month of April 1946, it doesn't matter to the court in interpreting the contract whether the plaintiffs made a profit or loss.

The Court: It indicates there was a substantial increase in price. It is similar to the situation that arises in a patent lawsuit; in other words, to show that the invention has been reduced to practice you may show the sale, not as an indication of damages.

(Testimony of Albert F. Metz.)

but to show it was not a proper payment. The object of having this in is to show that there was a substantial fluctuation in price, although the testimony that there was an increase, whether it was great or small, is not material. I think I will allow it to stand, to show that it was substantial.

Mr. Jarvis: The third motion to strike would be the testimony of Mr. Metz as to Code No. 472.1 being used by the Department of Labor, and the specifications did comply with [33] the specifications set out in this contract, being the same code number, and we fail to see how the use of such code number has any bearing on this case. I don't know that the matter is of much moment.

(Argument.)

The Court: Motion denied.

(Addressing Mr. Prince) Have you any additional testimony?

Mr. Prince: No, we rest.

Mr. Jarvis: At this time the defendants wish to move the court for a dismissal of the action upon the ground that the plaintiff has failed to show that they are entitled to a judgment in this action, and there is sufficient evidence before the court now upon which the court can make a final determination of this action.

The Court: The motion will be denied. I desire to determine the matter in the light of all evidence.

WILLIAM R. FOSTER

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Court: State your name, please.

The Witness: William R. Foster. [34]

Direct Examination

By Mr. Jarvis:

Q. Where do you live, Mr. Foster?

A. 640 Grand Avenue, South Pasadena.

Q. By whom are you employed?

A. The Department of Water and Power, City of Los Angeles.

Q. How long have you been employed by the Department of Water and Power of the City of Los Angeles? A. A trifle over 40 years.

Q. In what capacity are you now employed?

A. Purchasing agent.

Q. How long have you been?

A. Since January 1941.

Q. You have been purchasing agent for the Department of Water and Power since January 1941? A. Yes.

Q. Continuously? A. Yes.

Q. Are you familiar with the contract in the action where the price for adjustment is to be based upon the index of wholesale prices for Group VI? A. Yes.

Q. When did you first become familiar with that clause? [35]

(Testimony of William R. Foster.)

A. I would say early in 1941.

Q. In what connection?

A. Making a study of various price adjustment clauses so that we could secure the necessary material.

Q. Did the Department use that clause for adjustment? A. Many of them.

Q. How many?

A. I have a complete file, I think.

Q. In other words, this type of adjustment clause has been used by the Department?

A. Yes.

Q. This is a record you had made under your supervision and control? A. Yes.

Q. What does that show?

Mr. Prince: I want to object to it as incompetent, irrelevant and immaterial. Briefly, we are trying this contract and this clause; not some other contract.

The Court: To what is this testimony directed?

Mr. Jarvis: To show the extent it was used, not only by the Department, but by other companies.

The Court: I can't see how the widespread use of the clause is material.

Mr. Jarvis: Only, if we can show it was widespread, the plaintiff might have known of it.

The Court: The fact that they accepted it is the important part; not whether they knew of it or not.

The objection will be sustained. I will allow Mr.

(Testimony of William R. Foster.)

Foster to state what he communicated to the representatives of the plaintiff with regard to this clause, if there was any discussion on it.

Q. (By Mr. Jarvis): Will you, as the court has suggested, tell what conversations you had with any representative of the plaintiff, where it took place, and what was done and said, in substance.

Mr. Prince: And the time.

Mr. Jarvis: Yes.

A. The time I can't tie down to any exact date, but it was March, 1946. We had two contracts at the time.

Q. What was the other? A. Cable.

Q. Do you know the number?

A. 9266. There were three contracts awarded under it.

Q. What were they?

A. 9266A, the contract of the Okonite Cable Company, Inc.; 9266B, the General Electric Company, and 9266C, the General Cable Corporation.

Q. What was the date of those contracts?

A. The date of the contracts was May 1946.

Q. The same date as this contract? [37]

A. Yes. However, the advertisement was not posted that same date.

Q. The advertisement in 9317 was what?

A. May 29th.

Q. Bids to be returned what date?

A. April 11th.

(Testimony of William R. Foster.)

Q. The bids were received, were opened, and award made to the three companies you have mentioned for the different items in the specifications?

A. Yes.

Q. The other two companies receiving other items under the specifications? A. Yes.

Q. When did you have any conversation with the representative of The Okonite Company?

A. Prior to the advertisement in the month of March. I prepared a rough draft from a contract, which I hoped would cover it.

Q. What was the nature of that?

A. I prepared a rough draft, and discussed it with representatives of the various firms, including Okonite, and the one which was allowed, I think, in this case was given to the representative and he was to give his reply as to whether they would go along with that contract—the one with the adjustment clause. A reply was received—the last one was [38] received March 29th.

Q. So your conversation was prior to that?

A. Yes.

Q. What was your reason for considering the price adjustment clause at that time?

A. Because it was impossible to buy material of any one on a firm price basis.

Q. Did you use this adjustment clause to purchase material? A. Yes.

Q. During the period from 1941 to 1946?

A. Yes. It was from 1941 to 1948; not 1946.

(Testimony of William R. Foster.)

Q. Who was the representative of the Okonite people? A. Ted Kennedy.

Q. As I understand you, you cannot fix the time exactly? A. No.

Q. In substance, the conversation was just as you have said? A. Correct.

Q. That is, they would be agreeable to this form of price adjustment clause? A. Correct.

Q. Was anything said by you or Mr. Kennedy subsequent to May 21st? [39]

A. No. There was nothing further discussed.

Q. Did Mr. Kennedy report back to you concerning his company's attitude toward the clause?

A. Yes, and they agreed to give us a quotation, and did.

Q. Prior to that, that will be prior to March, 1946, you received this information from Mr. Kennedy? A. Yes.

Q. That is all.

Cross-Examination

By Mr. Prince:

Q. As I understand your testimony, you prepared this price adjustment clause, which you say was identical with this, and gave a copy to Mr. Kennedy?

A. No. Just a rough draft.

Q. Was there any discussion with Mr. Kennedy that they would want the contract for lead and copper?

A. No. He had a copy of a book on my desk. I

(Testimony of William R. Foster.)

don't remember whether it was the lastest statistics. I looked it over. It was a general discussion.

Q. And in 1948 you discontinued this clause?

A. No; we haven't discontinued it yet.

Q. Didn't your new contracts differ entirely?

A. The last one had the identical clause. That was December 1948. [40]

Redirect Examination

By Mr. Jarvis:

Q. What other type of material was purchased under this price adjustment clause?

A. We have seamless carbon molybdenum pipe, oil circuit breakers, metal enclosed switchgear, cast steel valves and—I am skipping about—lead covered cable, heat exchangers and steam turbine electric generators, and other items.

Q. This price adjustment clause was used generally in all contracts during this period?

A. All contracts of this nature; not all contracts.

Q. All contracts of the nature of the items you specified. A. Yes.

Q. What was the reason for that?

A. That clause was worked up primarily in the hopes that we would not have too many adjustment clauses, and we could use one adjustment for the material. It was picked because that group was used in a lot of materials and equipment that we purchased. It was thought it would save the necessity of having different types of adjustment. We

(Testimony of William R. Foster.)

changed our own adjustments. We changed first in the latter part of 1946. We renewed what we called the OPA price adjustment clause base in the Office of Price Administration.

Q. Did that have reference to the price index of the [41] Department of Labor?

A. I don't remember all the details.

Q. I don't care to go into any more detail than necessary. I want to show you did, however, change the clause.

Recross-Examination

By Mr. Prince:

Q. How did you come to put in the escalator clause?

A. There were two reasons. The first one was, to be able to do business, and, second, the adjustment clause was a protection to the parties.

Q. You were trying to work out a fair clause for the protection of both parties?

A. Yes. The main thing, if prices went down we wanted it.

The Court: You were buying a great variety of products? A. Yes.

The Court: All sorts of electrical supplies?

A. Yes.

The Court: You were not interested so much in the general uptrend of prices as in the trend in things you wanted?

A. That is correct.

The Court: If the price of groceries had gone up

(Testimony of William R. Foster.)

100 per cent, you didn't care; you were interested in the price of electrical products?

A. The adjustment clause was to favor those particular [42] commodities,

Redirect Examination

By Mr. Jarvis:

Q. Why did you choose for the metal products Group VI?

A. For the purpose of reducing to the lowest possible mimimum the price adjustment clause we would have to use. There are a great many in that group, and we thought, to take a group of that kind, it would reduce a considerable number of price adjustment clauses, which we would have to have.

Q. What length of delivery periods would these contracts cover?

A. Anywhere from six months to two years, or more.

Q. Did you have in mind that the component figure for many groups was a more conservative figure on which to adjust the price? A. Yes.

Q. Rather than the individual commodity?

A. Yes.

(Short recess.)

CLYDE ERRETT

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

(Testimony of Clyde Errett.)

The Witness: Clyde Errett. [43]

Direct Examination

By Mr. Jarvis:

Q. Where do you live?

A. 428 South Holt Avenue, Los Angeles.

Q. What is your business or occupation?

A. I am comptroller and chief accountant, employed by the Department of Water and Power.

Q. How long have you been so occupied?

A. I have been in this particular position about ten and a half years; altogether in the Department about 29 years.

Q. I show you a compilation of figures, and ask you if you will please tell the court what that is.

A. This is a tabulation of invoices received from The Okonite-Callender Cable Company for the price adjustment between December 23, 1946 and April 16, 1947.

Mr. Jarvis: That is a tabulation of the invoices which have been received in evidence as Plaintiff's Exhibit 2—I am sorry; I picked up the wrong one. I should have said Defendant's Exhibit M. What you have is the tabulation of those invoices and the amounts and dates? A. Yes.

Mr. Jarvis: We will offer them in evidence as a part of Defendant's Exhibit M. We think they may be of some help in considering the invoices and the amounts and dates. [44]

Mr. Prince: I assume my objection that your Honor overruled will apply to these?

(Testimony of Clyde Errett.)

The Court: Yes.

Q. (By Mr. Jarvis): On these invoices it shows the dates of payment; that they were paid prior to the completion of the contract; that is, prior to March 24, 1947. Would you tell the court why they were paid prior to that time?

A. Each of these invoices has a 10 per cent discount if paid before 10 days. It was in order to take advantage of that that they were paid prior to that date.

Q. And the bills were paid prior to that date?

A. Yes.

Q. You heard Mr. Foster's testimony of the escalator price adjustment clause. Can you tell the court if the price adjustment concurs with other types of contracts?

Mr. Prince: I object to that is incompetent, irrelevant and immaterial.

The Court: I will allow it to the extent that this man communicated it to a representative of the Department. If not, I can't see any materiality at all.

Q. (By Mr. Jarvis): Have you talked to any of the representatives of The Okonite Company prior to the time you talked to Mr. Kennedy and Mr. Borda, I believe, in my office in the summer or early fall of 1947?

A. No, I did not. [45]

Q. As to the manner of payment of other contracts which contain the same adjustment clause, can you tell the manner of that payment?

(Testimony of Clyde Errett.)

Mr. Prince: I presume—

The Court: I will sustain the objection.

Cross-Examination

By Mr. Prince:

Q. You said you paid them to take advantage of the 10 per cent deduction. You were aware that that adjustment under the escalator or price adjustment clause was to be deferred until after the contract was completed?

A. No sir. If I may correct that: It was ½ of 1 per cent.

Redirect Examination

By Mr. Jarvis:

Q. I should have asked the manner in which the Department computed the escalation of the contract price of 20 per cent of the increase in labor cost. I show you Defendant's Exhibit L, which is the Bureau of Labor Statistics of average hourly earnings as shown in Table 2, page 7, and ask you if you will tell the court the manner in which the price adjustment was computed.

A. That was based on the average figures for the average period.

Q. That computation was made using the index figure [46] for the average hourly earnings?

A. That is correct.

Q. It shows an index figure for the month of April, and figures for each succeeding month?

A. For the period of the contract, or the average of the period involved.

Q. You are referring to the average of the index figure from April to October?

(Testimony of Clyde Errett.)

A. If that was the period.

Q. And the other period of time, using the average from April to January 1947? A. Yes.

Q. And the other being April 1946 through March 1947?

A. That is right.

Q. In other words, the same manner of computation of adjustment of labor as used by The Okonite Company?

A. That is correct.

Recross-Examination

By Mr. Prince:

Q. That is the smallest subdivision of labor figures under that group of electrical products? In other words, you took your electrical equipment and the wages?

A. That is correct. But I don't understand what you mean by the smallest group.

Q. It is one of the smallest groups under electrical [47] matter—electrical equipment, radio and phonographs, and communication equipment? There is no other subdivision?

A. No, sir. Those are the three items.

Q. That is all.

BORIS A. GRAY

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

(Testimony of Boris A. Gray.)

A. Boris A. Gray.

Direct Examination

By Mr. Jarvis:

Q. Mr. Gray, you are employed by the Department of Water and Power? A. Yes.

Q. In what capacity?

A. I am electrical engineer in the underground engineering section.

Q. You work directly under Mr. Jenkins?

A. Yes.

Q. You prepared the table shown in Defendant's Exhibit B?

A. Yes, I did.

Q. You also prepared the chart shown on Defendant's Exhibit C? A. Yes. [48]

Q. The testimony of Mr. Metz this morning was that about 90 per cent of the cost of materials was comprised of lead and copper. Is that true for each particular type of cable? A. No.

Q. Can you give the variations as to each type of cable?

A. I prepared an additional table as to lead and copper. Item VI, 84.67 per cent; Item VII, 82.31 per cent; Item X. 97.10 per cent.

In all other items it runs above 90 per cent.

Q. You might give the figures for Items XIV, XV and XVI.

A. Item XIV, 93.16; Item XV, 91.01; and Item XVI, 91.99. The average of all would be 91.33.

Q. That varies with each type of cable, between

(Testimony of Boris A. Gray.)

82.31 per cent of copper and as high as 97.10 per cent? A. That is correct.

Q. Referring to the chart or diagram, can you compare the per cent of copper as to lead?

A. Well, the percentage of cost of copper as to lead varies with the different items. For example, Item VI, lead, it is 1½ for copper; Item VII, it would be about five times [49] costlier; for Item X it would be about two-thirds; Item XV, it is about 2½ over, and Item XVI, it is about 3 to 1. So the percentage of lead and copper varies all over the scale in accordance with the type of cable these materials are used in.

Q. Do you find in copper and lead any basis on which the lead and copper are a 50-50 basis?

A. I couldn't say as to lead and copper. There may be an occasional instance in which lead and copper could be used in the same proportion, but neither by volume or weight.

Q. Your testimony would be the same with respect to the different averages of the cable that was advertised and awarded to other companies?

A. That is correct.

Q. Do you agree with Mr. Metz' statement on the stand before this court?

A. Mr. Metz might be right, but in the actual manufacture of cable the tolerances are permitted, either up or down. It depends on the particular use of the cable, as to the lead and copper.

Q. In any particular cable you make up, that tolerance may be both ways?

(Testimony of Boris A. Gray.)

A. Tolerances are both ways.

Mr. Prince: I have no questions, your Honor.

The Court: The figures you were reading from were prepared [50] from this table which you have numbered V, is that correct?

A. That is correct.

Mr. Jarvis: We offer that in evidence, as to the percentage of cost.

The Witness: May I add that these figures are based on the figures on this, in the same relation. (Referring to Exhibits C and N.)

Mr. Prince: As I understand, there are instances in accordance with what Mr. Metz testified, that it might be within 90 per cent in a particular piece of cable? A. Yes, but not in all of them.

The Clerk: This is Defendant's Exhibit N.

(The document referred to was received in evidence and marked Defendant's Exhibit N.)

Mr. Jarvis: We have here a copy of the United States Department of Labor, Bureau of Labor Statistics, the monthly Labor Review, Vol. 62—No. 6, for the month of June 1946, which is the monthly publication of the Department of Labor, and it is on the terminology of the contract and contains, on page 974, a table or index of the wholesale group of commodities in April 1946, compared with the previous months, the previous months being March 1946, April 1945 and August 1939.

It contains two indexes: Wholesale prices by groups of commodities for several years, showing the index figures for [51] all commodities, and they

(Testimony of Boris A. Gray.)

fall into ten groups, one of which is Metals and Metal Products.

We will offer at this time the two tables to the court for the purpose of showing the same figures as shown in another publication of the Department of Labor. We are only offering the two tables.

(Discussion.)

The Court: The objection will be sustained. It has no standing in court. It is merely a reprint of the official statistics, and a mimeographed copy has already been introduced.

Mr. Jarvis: That completes our case.

Mr. Prince: We rest.

(Whereupon court was adjourned.) [52]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of August, A.D., 1949.

/s/ HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed Aug. 23, 1949. [53]

Trial resumed pursuant to adjournment.

The Court: Gentlemen, when we have a respite new thoughts sometimes occur to counsel and they sometimes occur to the court, so before we proceed, I am going to ask if, notwithstanding the fact that both sides have rested, in the matter of an afterthought you have thought of some additional matters you desire to put into the record?

Mr. Prince: Not from our point of view, your Honor.

The Court: One thought has occurred to me, gentlemen, in studying the exhibits between adjournment time and now, that in the interests of a complete record and because of the wording of this clause in the contract, the price adjustment clause, and because I have adopted a liberal rule in allowing the introduction of matters that bear upon the interpretation, and subdivison 2. b. of this clause is rather general in identifying the compilation, that I should change my ruling and allow the issue of the Labor Review containing the data which was offered yesterday to go in. I am still of the view that I was of yesterday, that they do not have the sanction of the statistics which are given separately, which are compiled and distributed separately every month, but, in view of [3*] the fact that there may be a difference in the content of these, I believe they should all be before men and, if objection is made upon the ground of proper authentication, I am inclined to change my ruling and allow it to go in.

*** Page numbering appearing at top of page of Reporter's original Transcript of Record.**

Then we will discuss the effect to be given to one or the other.

Mr. Prince: That is entirely satisfactory, your Honor. I think that I might suggest this, in view of that particular admission of that, this is simply a later edition, your Honor, a 1948 edition of the same publication. They have apparently changed the size of it, but it is the identical publication. This on page 155 is what I read from yesterday, which explains the official figures. I think that your Honor should have this before you, also.

The Court: Well, if he insists on getting it in, we will have both of them.

Mr. Prince: Yes. I thought we ought to have both of them.

The Court: Did you identify that yesterday?

Mr. Jarvis: I did, for the record, but I am in the unfortunate position of not now having the pamphlet with me. I had 10 or 12 yesterday, but the weight was such that I left them in the office this morning.

Mr. Prince: The table, your Honor, is in this one, and I have a different number. The other articles of content, [4] this table D-9 is the same.

Mr. Jarvis: As Mr. Prince says, it is the same publication, only of a different size. However, it is of a later date and doesn't contain the particular table or index figure applicable for the period of the contract.

The Court: Can't you call up someone in your Department to send it over?

Mr. Jarvis: Yes.

The Court: Your office is only a stone's throw from here. It will only take a short time.

Mr. Jarvis: Surely.

Mr. Prince: Of course, you would probably have to put in 12 of them to cover the whole period, which seem to me isn't of importance. Either one of them is enough to put in.

Mr. Jarvis: The thought occurred to me that we could do the same as we did on the yearly wage index, put in one as an example.

The Court: As an example. All right, we will give it a number now, and you supply it. Give it a number now.

The Clerk: That will be Defendants' Exhibit O in evidence.

Mr. Prince: And could this one follow then, this other [5] one?

The Court: Then, you will supply that to the Clerk?

Mr. Jarvis: Yes; we will.

The Court: Then you will have it brought here?

Mr. Jarvis: Yes.

The Court: And it will be only the pages relating to these statistics.

Mr. Jarvis: Yes. Tables 1 and 2.

Mr. Prince: The only page I am interested in is this technical explanation of the wholesale price indices which appears on page 155.

The Court: All right, we will receive that in evidence as the next plaintiff's exhibit.

The Clerk: Plaintiff's Exhibit No. 3.

The Court: As Plaintiff's Exhibit 3. All right.

(Page 155 of the publication Monthly Labor Review of August, 1948, Vol. 67, No. 2, so offered and received in evidence, was marked as Plaintiff's Exhibit 3.)

Mr. Prince: May I proceed, your Honor?

The Court: That completes the record. And you will supply that document?

Mr. Jarvis: Yes, I will.

The Court: All right.

(Argument on behalf of Plaintiff, by Mr. Prince.) [6]

The Court: All right, Mr. Jarvis.

Mr. Jarvis: Counsel and if the court please, the Monthly Labor Review has been handed to the Clerk, a copy of it.

The Court: Yes. It has been marked Defendants' Exhibit O.

(Said copy of publication Monthly Labor Review, Vol. 62, No. 6, June, 1946, and specifically page 974 thereof, were marked as Defendants' Exhibit O in evidence.)

Mr. Jarvis: By referring to that, the Court can see very readily how we reach the 6th group. By counting down from the top on the lefthand page, you come to the 6th group, and a Roman numeral is used but it does not appear in the pamphlet itself.

The Court: You are eliminating the first one, "All commodities." Otherwise, it would be the 7th.

Mr. Jarvis: Well, "All commodities" means the composite figure for the entire index.

The Court: Yes.

Mr. Jarvis: And then all commodities are divided into the 10 groups of which Metals and metal products constitute the 6th group.

The Court: Well, this is that subdivision of a separate table. [7]

(Argument on behalf of Defendants, by Mr. Jarvis.)

(Closing argument by Mr. Prince on behalf of Plaintiff.)

The Court: All right, Gentlemen, the matter will stand submitted. I thank you for the swiftness with which you presented it. I will determine it within the next few days. [8]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 23rd day of July, A.D., 1949.

/s/ THOMAS B. GOODWILL,
Official Reporter.

[Endorsed]: Filed Aug. 22, 1949.

[Endorsed]: No. 12337. United States Court of Appeals for the Ninth Circuit. Department of Water and Power of the City of Los Angeles, et al., Appellants. vs. The Okonite-Callender Cable Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 25, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 12337

THE OKONITE-CALLENDER CABLE COMPANY, INCORPORATED

Plaintiff and Appellee.

vs.

DEPARTMENT OF WATER AND POWER OF THE CITY OF LOS ANGELES; THE CITY OF LOS ANGELES, a Municipal Corporation

Defendants and Appellants.

I. STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY;

II. DESIGNATION OF RECORD MATERIAL TO CONSIDERATION OF APPEAL (RULE 19, USCA—9)

I.

Statement of Points on Which Appellants Intend to Rely

The statement of the points on which the Department of Water and Power and the City of Los Angeles, appellants in the above-entitled action, intend to rely on their appeal herein is as follows:

1. The trial court erred in overruling the appellants' objections to the appellee's introduction of the following evidence:

(a) That at the time of appellee's bid, and at the time the bid was accepted, and at the time of

entering into the contract, there was an extreme shortage of lead and copper.

(b) That appellee did not have on hand at the time of the bid, at the time the bid was accepted, or at the time the contract was entered into, sufficient lead and copper, or either of them, to manufacture the cable to be furnished under the contract.

(c) That at the time of the bid, its acceptance and the execution of the contract, and for a number of months thereafter, the purchase and use of lead and copper by manufacturers were controlled by the United States Government, and appellee was able to purchase from time to time only sufficient amounts of lead and copper to meet current manufacturing requirements and deliveries under the contract.

(d) That appellee used reasonable diligence, and, subject to Government regulations, purchased from time to time the amount of lead and copper required in the manufacture of cable.

(e) That in so purchasing lead and copper, the appellee was required to pay and did pay for lead and copper about $24,000 in excess of the market price of lead and copper in the month of April, 1946.

(f) That the excess actual cost of lead and copper in the sum of $24,000 is more than the amount sought to be recovered by appellee, plus payments made by the appellants, on account of the Price Adjustment Clause.

(g) That the cost of lead and copper used in the manufacture of all of the items of cable, as a group, amounted to slightly in excess of ninety per cent of the total cost of all material used in the manufacture of cable to be furnished under the contract.

(h) That the contract specifications controlling the quality and type of copper and lead to be used in the cable are identical with the quality and type of copper bearing United States Department of Labor Commodity No. 472.1 (Copper, electrolytic, delivered Connecticut Valley), and lead bearing United States Department of Labor Commodity No. 473 (Lead, pig, desilverized, f.o.b. New York).

(i) In permitting the introduction of all of the United States Department of Labor Bulletin No. 920, "Wholesale Prices, 1946," Tables 1 and 2 of said bulletin, instead of only Tables 1 and 2 on pages 11, 12 and 13.

(j) In permitting the introduction of all of the United States Department of Labor Bulletin No. 920, "Wholesale Prices, 1946," Tables 1 and 2 of said bulletin, instead of only Tables 1 and 2 on pages 11, 12 and 13, and Table 12 on pages 38 to 137.

2. The Court erred in denying appellants' motion to strike the testimony of appellee's witness that the cost of copper and lead constituted ninety per cent of the cost of all materials used in the manufacture of cable; that appellee did not have sufficient copper on hand to meet the requirements of the contract in May, 1946, and had to purchase copper and lead from time to time, and that the

figures of the Bureau of Labor Statistics refer to copper as specified in the contract as Code No. 472.1, and refer to lead specified in the contract as Code No. 473.

3. The Court erred in sustaining appellee's objections to the introduction by appellants of the following evidence:

(a) That the Price Adjustment Clause in question had been used extensively by the Department and by other companies;

(b) Whether the Price Adjustment Clause concurred with other types of contracts and the manner of payment of other types of contracts containing the same price adjustment clause.

4. The evidence is insufficient to support the Findings of Fact in the following particulars:

(a) The index of wholesale prices compiled monthly by the United States Department of Labor referred to in the contract "was intended to and does refer to the index numbers of copper, being Commodity No. 472.1, and lead, being Commodity No. 473," both of which are individual commodities, and are two of the twenty individual commodities comprising the fourth subgroup entitled "Nonferrous Metals," which is in turn one of the five subgroups comprising the group entitled "Metals and Metal Products."

(b) Metals and Metal Products, as a group, as listed in the United States Department of Labor, index of wholesale prices compiled monthly by the United States Department of Labor, is a "subgroup" under "All Commodities."

(c) The contract provisions that the contract price was subject to adjustment for changes in "material costs were not intended to and do not refer to said Metals and Metal Products as a group or subgroup for the purpose of taking the index numbers of Metals and Metal Products as a group for use in computing any increase or decrease of the contract price."

(d) The reference by the contract provision that fifty per cent of the contract price representing material will be adjusted for increases in material costs, such adjustment to be based on the index of wholesale prices for Metals and Metal Products compiled monthly by the United States Department of Labor, "was intended solely as a reference to the appropriate place in said 'Index Numbers of Individual Commodities' under which the index numbers for copper and lead were to be found."

(e) The monthly mimeographed publications of the United States Bureau of Labor Statistics "are examples of the publications intended to be referred to by the Price Adjustment Clause of said contract as the proper source from which are to be taken the index numbers relating to lead and copper as constituting the material used in said cable."

(f) The monthly publication entitled "Labor Review" (Defendants' Exhibit "O") is not an example of the monthly publication referred to or intended to be referred to by the provisions of the Price Adjustment Clause in the contract.

(g) The groups and subgroups of commodities

contained in the "Monthly Labor Review" are a reprint and are not up-to-date when published.

(h) "Whenever said Price Adjustment Clause in said contract refers to 'material' or 'increases in material costs' or 'decreases in material costs' or similar words or phrases, the word 'material' or 'materials' refers to copper, electrolytic, delivered Connecticut Valley, and lead, pig, desilverized, f.o.b. New York, which are the principal component parts of the cable referred to in said contract."

(i) A formula or any method or manner of computing percentages of increase of index numbers relating to copper and lead in said "Index Numbers of Individual Commodities" for the periods from April, 1946, through October, 1946, and April, 1946, through January, 1947, and April, 1946, through March, 1947.

(j) The manner or the method or the formula by which said percentages for said three periods last mentioned are related to the contract price.

(k) The appellee is entitled to recover, "in addition to all amounts heretofore paid by defendants to plaintiff," the sum of $9,996.69, with interest at seven per cent per annum from May 1, 1947, or any other sum.

(l) The appellee is entitled to recover interest at seven per cent per annum upon the principal amount of the judgment, or at any rate on any sum.

(m) The adjustment of the contract price on the basis of the composite index for the group entitled "Metals and Metal Products" would render the

contract payment clause unfair or unreasonable or inaccurate or speculative.

(n) The construction set forth in the Findings renders the contract payment clause reasonable or fair or definite, and it is the only construction which the parties, as reasonable business men, could have had in contemplation when the contract was executed.

(o) The allegation in Paragraph IX, page 13, lines 13 to 26, of defendants' Answer is untrue.

5. The evidence is insufficient to support the judgment of the Court herein in each of the particulars hereinbefore specified and set forth under Paragraphs 2(a) to (o), inclusive.

6. The Findings of Fact and Conclusions of Law herein are contrary to the facts and are not supported by the evidence.

7. The Judgment herein is contrary to the facts and the evidence is insufficient to support the Judgment.

8. The contract must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting, and not interpreted using "hind sight."

9. The wording of the contract is not ambiguous and must be interpreted to give effect to the mutual intention of the parties, which clearly was to have the price adjusted upon the basis of the index for the "Metals and Metal Products" group.

10. This is a contract between a public body and a private party and so it is presumed that any uncertainties in the language of the contract were

caused by the appellee and that it should be interpreted most strongly against it.

11. The sending of six invoices and accepting payment therefor based upon the group index rather than the individual commodities index is the best evidence of the intention of the parties in the making of this contract, and should be adopted and enforced by the Court.

II.

Designation of all the Record which is Material to the Consideration of the Appeal

Appellants' designation of all the record which is material to the consideration of the appeal herein is as follows:

Title of Document	Pages of Official Certified Record
Answer	8- 26
Complaint for Money Due on Contract	2- 7
Decision of the Court	71- 73
Defendants' Motion for New Trial	94-116
Designation of Record on Appeal, Appellants	131-133
Designation of Record on Appeal, Appellee	134-136
Findings of Fact and Conclusions of Law.	74- 88
Judgment for Money Due under Contract.	89- 93
Minute Order Entered May 2, 1949	126
Notice of Appeal	130
Order Extending Time to File Record on Appeal	137-138
Order Extending Time to File Record on Appeal	139-140

All of the Reporter's Transcript of Proceedings for February 23 and February 24, 1949, together with Plaintiff's Exhibits 1 to 3, inclusive, and Defendants' Exhibits "A" to "O," inclusive. (Appellants desire and intend to apply to the Court for an order dispensing with the printing of these voluminous exhibits, many of which are in printed form, in order to save the cost of printing.)

Dated: Los Angeles, California, August 23, 1949.

/s/ RAY L. CHESEBRO,
City Attorney.
/s/ GILMORE TILLMAN,
Chief Assistant,
City Attorney for Water and Power.
/s/ RUSSELL B. JARVIS,
Assistant City Attorney.
/s/ GERALD LUHMAN,
Deputy City Attorney,
Attorneys for Defendants and Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 23, 1949. U.S.D.C.

[Endorsed]: Filed Aug. 25, 1949. U. S. C. A.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF RECORD MATERIAL TO CONSIDERATION OF APPEAL (RULE 19, USCA—9)

In addition to those documents, records and exhibits designated by appellants as being material to the consideration of the appeal herein, appellee hereby designates the following documents:

Title of Document	Pages of Official Certified Record
Defendants' memorandum prior to trial...	60- 70 inclusive
Plaintiff's pre-trial points and authorities pursuant to Local Rule 12	27- 59 inclusive

Dated at Los Angeles, California, this 25th day of August, 1949.

STEPHEN A. WILSON,
GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY,
By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff and Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed Aug. 29, 1949.

[Title of Court of Appeals and Cause.]

1. APPLICATION OF APPELLANTS FOR ORDER DISPENSING WITH PRINTING OF EXHIBITS

2. ORDER DISPENSING WITH PRINTING OF EXHIBITS

Application of Appellant for Order Dispensing with Printing of Exhibits

Come Now the Department of Water and Power of the City of Los Angeles and the City of Los Angeles, a municipal corporation, appellants in the above-entitled action, through the City Attorney of Los Angeles, and respectfully represent as follows:

All of the exhibits introduced in evidence at the trial of the above-entitled action are included in the Designation of Record Material to Consideration of Appeal herein filed August 25, 1949, being Plaintiff's Exhibits 1 to 3, inclusive, and Defendants' Exhibits "A" to "O," inclusive, and are classified generally as follows:

1. About 141 pages printed material. (See Plaintiff's Exhibits 1 and 3; Defendants' Exhibits "N" and "O.")
2. About 73 pages mimeographed material. (See Plaintiff's Exhibit 1; Defendants' Exhibits "A" and "L.")
3. About 45 pages typewritten material, including completed printed forms and 15 pages photostatic material. (See Plaintiff's Exhibit 2;

Defendants' Exhibits "A," "B," "K" and "M.")

4. Three pages printed and hand-made drawings and charts (some in color). (See Defendants' Exhibits "C" and "D.")
5. Physical material: Six small sections of lead-covered cable. (Defendants' Exhibits "E" through "J.")

The clerk of the above-named Court has estimated the cost of printing the transcript included in the Designation of Record Material to Consideration of Appeal filed herein to be $340.00, exclusive of any exhibits.

There are in all about 262 pages of exhibits. More than 140 pages of the exhibits are printed matter issued by the United States Department of Labor. There are 49 pages of exhibits consisting of mimeographed material also issued by the United States Department of Labor. As many copies of these Department of Labor publications as are desired will be furnished the Court upon request if they can be secured from the United States Government Printing Office.

If additional copies are requested by the Court, appellants offer to furnish as many copies as may be requested of Plaintiff's Exhibit 2 and Defendants' Exhibits "A," "B," "C," "D," "M" and "N."

Appellants make this request in order to save the cost of printing these exhibits and supervision of printing by the Clerk, all of which would amount

to a substantial sum, estimated by appellants to be in excess of $600.00.

Wherefore, appellants respectfully request that the Court make its order herein dispensing with the printing of all exhibits in connection with the appeal of this action.

Dated: Los Angeles, California, August 31, 1949.

/s/ RAY L. CHESEBRO,
City Attorney.
/s/ GILMORE TILLMAN,
Chief Assistant,
City Attorney for Water and Power.
/s/ RUSSELL B. JARVIS,
Assistant City Attorney.
/s/ GERALD LUHMAN,
Deputy City Attorney.

STIPULATION

It Is Hereby Stipulated by the Okonite-Callender Cable Company, Incorporated, appellee in the above-entitled action, that the Court herein may make its order dispensing with the printing of all exhibits included in the Designation of Record Material to Consideration of Appeal herein.

Dated: Los Angeles, California, September 1, 1949.

STEPHEN A. WILSON,
GIBSON, DUNN & CRUTCHER,
HENRY F. PRINCE,
FREDERIC H. STURDY,
By /s/ FREDERIC H. STURDY,
Attorneys for Plaintiff
and Appellee.

ORDER DISPENSING WITH PRINTING OF EXHIBITS

The Court having considered the application of the Department of Water and Power of the City of Los Angeles and The City of Los Angeles, a municipal corporation, appellants in the above-entitled action, for an order dispensing with the printing of all exhibits in this action, and the agreeing stipulation of appellee.

It Is Hereby Ordered that the printing of Plaintiff's Exhibits 1 to 3, inclusive, and Defendants' Exhibits "A" to "D" and "K" to "O," inclusive, be and the same is hereby dispensed with.

Dated: September 7, 1949.

/s/ WILLIAM DENMAN,
Chief Judge.
/s/ HOMER T. BONE,
Circuit Judge.

. . . . . .
Circuit Judge.

[Endorsed]: Filed Sept. 8, 1949.